UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATION BOARD
Division of Administrative Law Judges
San Francisco, CA

KAVA HOLDINGS, LLC, a
Delaware Limited Company, f/k/a
KAVA HOLDINGS, INC., a
Delaware Corporation, d/b/a
HOTEL BEL AIR

and

Case 31-CA-074675

UNITE HERE - LOCAL 11

RESPONDENT'S POST HEARING BRIEF

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STATEMENT OF FACTS

A. Hotel Bel-Air Was Over Sixty Years Old in 2009, and Facing New Competition in the Luxury-Hotel Market of Los Angeles.

The Hotel Bel-Air is a unique 103-room luxury hotel in Los Angeles. Established in the 1940s [1], the Hotel is located a short distance away from The Beverly Hills Hotel on Sunset Boulevard, both of which are operated by Dorchester Collection. Tucked away inside the quiet Bel-Air neighborhood on Stone Canyon Road, far from the traffic of Sunset Boulevard, the Hotel offers a reclusive, resort-quality ambience of quiet luxury, though close to the commercial and residential areas in and surrounding Beverly Hills and Hollywood. Over its sixty-plus years prior to the events at issue, Hotel Bel-Air was a desired destination for persons of wealth and fame.

Sixty years of continuous operation will take its toll on the physical structure of any business operation – particularly hotels, which operate year-round on a 24/7 basis. This was the reality facing Dorchester Collection in 2009. The situation called, however, for more than just the reconstruction of rooms, doors, windows and walls. A more fundamental rethinking was necessary, for the Hotel had become "simply outdated and [was] not relevant anymore." Tr. 2560 (testimony of key witness, Christophe Moje, who served as Hotel Manager upon the 2011 re-opening, and who made the final hiring decisions, discussed below).

The fact that the Hotel had become "outdated" and "not relevant" was especially critical, given an additional reality facing Dorchester: the rise of competition within the luxury-hotel market of Los Angeles. Witness Steven Boggs described this "competition in the field," and its impact, by pointing to the relatively recent arrivals on the market of luxury competitors like the

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[1] Witness Steven Boggs testified the Hotel was built in 1948. Tr. 1729. Other published sources indicate 1946.

Waldorf Astoria on Wilshire Boulevard, The Peninsula and The Montage. Tr. 1729-30. Mr. Boggs contrasted this new reality with the Hotel's earlier decades, when it was virtually competition-free. Id.

The Bel-Air was no longer able to rest simply on the laurels of its sixty-year history, as the newly arisen competition was now compelling Dorchester to pursue, as stated, a fundamental rethinking of how its services in the luxury-hotel market would be delivered to contemporary luxury-hotel guests. This called for more than just the accomplishment of a needed physical renovation. An entire makeover was necessary. The impact of these twin realities – an aged physical structure and the rise in competition – led to the decision to shut down the Hotel for a two-year period and to effectively start over. Upon re-opening, however, the new competition remained. The impact of this new competition played a significant role in how the Hotel selected the employees for the re-opening, as addressed in the sections to follow.

Witness Steven Boggs, quoted above, spent nine years working in the old Hotel Bel-Air, from 1992 to 2001, starting off as a room service captain, a union position, before becoming an assistant manager of the Hotel. Tr. 1659-60. Later, after transferring in 2001 to The Beverly Hills Hotel, he was promoted several times to managerial positions of increasing importance. Tr. 1705-07. Mr. Boggs was among the numerous managers from the Beverly Hills Hotel who participated in the July 2011 re-opening job fair. [2]

In describing the ambience of the old Hotel Bel-Air, Mr. Boggs likened it to a visit at a "rich uncle's house in the country." Tr. 1666. This phrase served, in fact, as something of a "motto" for eliciting its former ambience. Boggs further described this in the following way:

[2] Boggs was not an interviewer during the job fair; he served as a greeter. See discussion on the design of the job fair in section E, below.

> . . . so, you felt at home. We'd open the doors for you, make sure everything was ready for you and then *you had the place to yourself*. So, we [the service staff] were sort of a – I don't want to say hands off, but it was *unseen service*, if that makes sense . . . everything we did was sort of behind the scenes. The guests just sort of roamed. It was very – we said it was *reclusive* without being exclusive, [a] quiet serenity. You know, the swans swimming and sort of that. *And that worked until it didn't.*

Id. [emphasis added].

When asked to explain what he meant by "*that worked until it didn't*," Boggs testified: "[The Hotel] was struggling. The last few years of its life [prior to the 2009 closing], business was not where it needed to be . . . the occupancy had dropped. Rates had dropped . . . it was quickly about to become financially unsuccessful." Tr. 1669. Echoing these facts, Christophe Moje testified that the Hotel prior to closure had been placing "last" among its "competitor set." Consequently, "we just didn't do well financially," and the Hotel's "former reputation" was no longer sufficient for sustaining its ability to compete. Id.

B. The 2009 – 2011 Renovation.

On September 30, 2009, The Hotel Bel-Air closed its doors to the public for a massive renovation. So massive, in fact, that the hotel was closed entirely to the public for all of two years and 14 days. By the time the Hotel re-opened, on October 14, 2011, renovation expenditures had soared to exceed 100 million dollars. Tr. 2560 (testimony of Christophe Moje). The financial commitment included also the loss of revenue for this two-year period. The decision to close down was nonetheless necessary, in view of (a) the extent of the renovation – the entire hotel was "down to the studs," as described below – and (b) the expectations held by Bel-Air guests, for a reclusive destination of luxury and quietness.

Steven Boggs testified to the renovation creating a "night and day" difference: "We tore it down to the studs . . . if you went to bed in the old Bel-Air and woke up in the new Bel-Air, you'd have no idea where you were." Tr. 1666-67.

> MS. PALENCIA: The old Hotel Bel-Air wasn't demolished, correct?
>
> A . . . [The Hotel] was torn down to the studs. I don't know if that qualifies as demolition. I mean, we call it demo when you knock holes in walls. But it was torn down to the studs.
>
> Q BY MS. PALENCIA: But there were buildings that remained, correct?
>
> A Correct.
>
> Q They were – the rooms remained, correct?
>
> A If you call framing a room, yes. The – let's just say the footprint existed – or stayed. How's that?

Tr. 1696.

The lobby, for example, underwent a "really dramatic change." Tr. 1669-71, and see also **Exhibit R-17**, pages 2 and 8. The same was true with respect to all of the guest rooms, as well as the lounge bar and all other public spaces. Id. Where once stood only a "fitness room," the Hotel added a "very large spa and fitness room, as well as loft suites above them." Id. See also, **Exhibit R-17**, page 1. In addition, a "large bar" was added to the outdoor terrace, and the "outdoor space of the restaurant" was increased to "add on additional tables." Id. The renovation also impacted the surrounding terrain – a steep hillside behind the Hotel was partially "demoed," into which a "series of more expensive suites" were built, "each one with its own outdoor space, outdoor Jacuzzi and pool." Id.

Instead of a standard hotel restaurant, as had been the case with the old Bel-Air, the Hotel 'partnered' with celebrity chef Wolfgang Puck "to run all the food and beverage." This partnering led to new, "very high . . . more intense" standards set by chef Puck, in keeping with his previously established celebrity-level success. Tr. 1671-72 (discussed in greater detail,

section D, below). "The kitchen became larger," in line with the new direction that "Wolfgang Puck was now handling" all aspects of the Hotel's food and beverage operation, including "room service, the pool, everything." Id.

C. The Changes Made to the Hotel Bel-Air's Standards of Service, and the Importance of the Forbes Five-Star Rating.

The service standards for the hotel, post-renovation, became "much more hands on." Tr. 1667. This was in contrast to the "unseen service" style of the old hotel, likened by Mr. Boggs to a "reclusive" stay at a wealthy country estate, and characterized also as a style "that worked until it didn't." Tr. 1666.

As Christophe Moje testified, the old Hotel's style had become "simply outdated and not relevant anymore." Tr. 2560. While the old style may have well suited many of the old Hotel's long-time loyal guests, the fact remained that the Hotel – prior to the 2009 closure – was standing "last in our competitor set, and we just didn't do well financially." Id. Consequently, Moje testified, "we knew we had to look for new customers." Id.

In turn, with respect to the selection of employees, that meant:

> . . . we have to look for a very specific type of personality that enables us to charge over $1,000 for guest rooms and that comes from a personality, [it comes] from excitement to be at Hotel Bel-Air [,] because we wanted to open it with the most anticipated opening of that year for any luxury hotel worldwide.

And thus, as Mr. Moje concluded: "[T]here was a lot at stake to hire the right people for the jobs." Id.

Summarizing the change in the style of service, made to attract these "new customers," Mr. Boggs described the "more hands on" approach as follows: "We needed to be much more intuitive, what we call emotional intelligence . . . the *staff had to be more interactive* with the guests than they had previously." Tr. 1667 (emphasis added).

Mr. Boggs' foundation of knowledge supporting this testimony, and the testimony described below, is substantial, and was neither contradicted nor called into question by any other witness. Employed with the old hotel from 1992 to 2001, his career has continued – going on sixteen-plus additional years as of the time of testifying – at the famous five-star Beverly Hills Hotel. Tr. 1705-07. In addition, Boggs was involved directly in "train[ing] some of the new staff at the front desk" of the new Hotel Bel-Air, in 2011. Tr. 1674.

> Q So tell me about the differences between the old Hotel Bel-Air and the new Hotel Bel-Air with regard to the front desk.
>
> A Old Hotel Bel-Air, if you look at the picture of old Hotel Bel-Air on the left [**Exhibit R-17**, pages 2 & 8], you'll see that there's a small desk there at the entryway. That was actually for the bellman . . . The bellman would take their luggage tags right there. Go off there. [Guests would] come over to the front desk. We'd check them in. If possible, we would walk them then to their rooms while the bellman got their luggage.
>
> Fast forward new Bel-Air. They introduced a lot [of] technology, meaning new Bel-Air when the guests arrived, we would have a front desk person whenever possible actually at the entrance to the hotel, so before they came over the bridge [at valet parking, prior to entering the lobby]. That person would then greet the guest. They'd have a [computer] tablet that they could use to see if the room was ready, see what room they were going to. Using this tablet, they would actually be able to check the guest in. They would, whenever possible, take that guest from the front all the way to the room.
>
> It had a swiping machine on it . . . for the credit card. And you could access all the software, the hotel software from this tablet. If that person was occupied, then they would radio the front desk and then again, off this – you can't quite see [referring to **GC-17**]. At the new Bel-Air, there's a smaller little desk area where two agents would be at.

Tr. 1674-75

> BY MS. DOWELL: Mr. Boggs, can you tell the Court the difference, if any, regarding an employee's attitude and interaction with guests with regard to the old Hotel Bel-Air and the new Hotel Bel-Air?

> A Certainly. The – again, going back to when they checked in, the front desk agent would have maybe a seven minute interaction with them. New Bel-Air, you met them out front, you walked with them. This could be like a 15 minute interaction with them. So you had to engage the guest right from the beginning, maintain that engagement and interaction all the way through, because remember, you weren't – *the front desk agent was no longer responsible for just checking somebody in.*
>
> *The bellmen weren't just responsible for bringing luggage.* Now they were *responsible for communicating with this guest*, having conversations with this guest, *getting them excited about the new hotel*. We anticipated a lot of new guests coming in that had never had experience with the Bel-Air, so it was important to have staff that could get them excited about the new hotel and then engage them. You're asking them a cornucopia of questions along the way. *It's a long walk*. I don't know if you've ever walked from the south side to the north side, but it's a long walk.

Tr. 1683-84 (emphasis added).

Mr. Boggs then made a clear connection to the type of employee the Hotel was seeking in 2011. In contrast to "unseen service," the employees were expected to engage meaningfully with guests:

> [W]hether you're a bellman, whether you're a housekeeper, whether you're a front desk agent, you had to engage in conversation with them and then *take that conversation*, *learn what you could* learn from it and then *pass it on to others* that might then help make their stay that much more enjoyable.

Id. (emphasis added).

This change in the standard of service, particularly as it relates to information 'passed along to others,' is directly tied to the famous hotel 'star' ratings determined and set by Forbes Travel Guide (formerly Mobil Travel Guide), which all upscale hotels strive vigorously to achieve. "On paper, the difference between four star and five star is nominal. The difference is

really in the details [of] . . . again, what we call in the business emotional intelligence." [3] Tr. 1668. Illustrating this difference, Boggs testified:

> For instance, if you're checking in and you tell the front desk person, oh yeah, it's been a long flight and I'm kind of tired, four star would say, oh, I'm so sorry. We're glad you're here. We'll make you comfortable. Five star, that person would then pick up the phone and call room service and say Mrs. Smith is tired. Let's send her an espresso. Let's send her some tea and cookies.
>
> Or if the guest happens to mention to the bellman, "My daughter's graduating." Four star, bellman says, "Oh, congratulations. That's terrific." Five star, the bellman would contact the pastry chef, would then hopefully know what college they were graduating from and sent up a little congratulations UCLA amenity. That's the difference.
>
> Q And those differences that you just described, the sending someone an amenity, whether that be coffee or tea or a desert, was that level of service provided when you were at the Hotel Bel-Air?
>
> A It was, but *to a much lesser degree* than *where it needed to be*, if that makes sense.

Tr. 1668 (emphasis added).

The question of "*where it needed to be*" relates, once again, to obtaining and maintaining the fifth star:

> A . . . It's what the [Forbes, formerly Mobil] inspectors look for, *what guests are now looking for*, is that ability for them – again, we call it emotional intelligence. I'm sure there's probably a better word for it. But we call it that. And that means how intelligent can you be, *how well* can you *engage with a guest*,

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[3] Judicial/administrative notice can be taken related to the popularized concept of "emotional intelligence," defined in a Wikipedia article on the subject as "the capability of individuals to recognize their own emotions and those of others, discern between different feelings and label them appropriately, use emotional information to guide thinking and behavior, and manage and/or adjust emotions to adapt to environments or achieve one's goal(s) . . . the term first appeared in a 1964 paper by Michael Beldoch, [and] gained popularity in the 1995 book by that title, written by author and science journalist Daniel Goleman."

> how well can you *gauge how they feel*, what they need *by talking with them*, by *listening* to the various signs. And *that's the difference now*.

Tr. 1729 (emphasis added).

Maria Carmelita ("Milet") Lukey, the Area Human Resources Director for Hotel Bel-Air and the Beverly Hill Hotel between 2011 and 2013, who was called in the General Counsel's case in chief, testified consistent with Mr. Boggs, in describing the "very exacting standards" used by Forbes in assessing whether a hotel is deserving of the five-star rating. "For example," she testified, "between the door to the front desk there are I think over 80 points that they look at when they are evaluating hotels." Consistent also with Boggs, Ms. Lukey made clear that Forbes focuses closely on the "very interactive" aspects of hotel service, illustrating this with some of the "80 points" of evaluation made by the Forbes on-site inspectors:

> So how did the door person greet them, were they warm, did they smile, did they welcome them? You know, some things have to be checked off in order for them to feel that, okay, this property could be a five-star property . . . for instance, the bell person that takes them to their room, it really involves a lot of steps as well. Like, they're expected to make sure that they orientate the guest in terms of where the room is. Orientate the guest in terms of the controls in the room and, you know, what they need to do in order to ask for service and stuff.

Tr. 547.

As noted in the opening section of this brief, the number of competitors for business in the Los Angeles luxury-hotel market, and elsewhere, has increased and has become fierce. Simultaneously, the Forbes Travel Guide has become more selective. Previously, as Mr. Boggs testified, "[t]here were a lot of Five Star hotels," but "[t]hey've slowly been sort of whittling them away." Id. By this whittling away, Forbes has "*raised the bar* in terms of this *emotional intelligence* . . . You now have to be better." Tr. 1729-30 (emphasis added). In addition, because

there are now *more* competitors: "you don't have to be better than two or three people; you now have to be better than the five or six people." Id.

On re-direct of Mr. Boggs, following a cross-examination focused on a comparison of the job descriptions for both the old and new hotels, Mr. Boggs explained the following:

> Q Based on your specific experience of 28 plus years in the luxury hotel industry, is there a difference between what a formal job description is and what an employee actually does?
>
> A Oh, absolutely.
>
> Q. Can you describe that for me, please?
>
> A A job description – and, again, I'm using my own experience. No legal stuff here. The job description is basically a legal document that outlines the minimums. This is what every single person has to have. So if you can't check off some of these boxes, then either you would have to realize I have to train someone to do it, spend the extra money, spend the extra time, or if you can't check off some of these more specific boxes, then they're not the right person.
>
> I think if you look on here [referring to job descriptions introduced on cross examination], it probably says something about *experience in another place*. *While that's important*, it's *not the end all*. I mean, some of my best employees – one of my managers I found in a *gift shop* somewhere. One of my best hotel managers was *working at a bar* in someplace.
>
> So yes, this [job description] is the minimum for the employees. This lets the employee know what the minimums are they have to have. But in terms of being great, so – I mean, *anyone that can do anything on this page would be a good employee*. But that doesn't make them a great employee. *And if you want*, in a Five Star luxury, to charge a million dollars per room, *you better be great, not good.*
>
> Tr. 1731 (emphasis added).

The Hotel upon re-opening needed to regain its Forbes five-star rating. This goal demanded nothing less than – as Boggs put it – "you better be great, not good."

D. The Hotel's Food & Beverage Operation Was Assigned to a Partnership with Celebrity Chef Wolfgang Puck, Resulting in Higher Culinary Standards.

As noted above in the testimony by Steven Boggs, Dorchester Collection 'partnered' with celebrity chef Wolfgang Puck, who was retained to "run all the food and beverage." This included not just the main restaurant, but all of the outlets – room service, poolside, *etc*. – that served food and served beverages. This partnering with Chef Puck led not only to the construction of a "larger kitchen," but to new, "very high . . . more intense" standards, in keeping with Chef Puck's well-established, celebrity-level success. Tr. 1671-72.

Edward "Sonny" Sweetman was selected by Chef Puck to serve as the executive chef over the entire culinary department of the Hotel. Mr. Sweetman described the arrangement between the Puck organization and Dorchester in the following way: "[T]he process working for Chef Puck is he does a lot of [Puck branded] licensing agreements and a lot of management contracts . . . Which means that we ultimately are paid by someone else but selected by him. So, I'm an employee [4] of the Dorchester Hotel, but selected [by] him to maintain [the Chef Puck] brand." Tr. 2384-85.

Chef Sweetman held the executive chef position at Hotel Bel-Air from prior to the re-opening in 2011 through October of 2013. Tr. 2383-84. Prior to that, after beginning his career as a line cook at the age of 15, he obtained a four-year degree from a famous culinary school, Johnson & Wales, followed by an apprenticeship with Hyatt Regency Hotels, and then seven years for the Ritz Carlton hotel company. His stint there included his leadership in opening a "six-star luxury resort in Austria for a famous hotelier named Horst Schulze." Sweetman then owned and operated a hundred-seat restaurant in Maryland, before moving to Los Angeles and

[4] Though he spoke here in a descriptive present tense, Mr. Sweetman was not a current employee of the Hotel or of Wolfgang Puck at the time of his testimony, as shown next.

working under Chef Puck for six-plus years. Chef Sweetman's duties with Puck in Los Angeles included "open[ing] L.A. Live, the entire city complex, where [Puck] has multiple restaurants," and also "re-opening, re-developing Sony Studios," related to "the food service on the movie lots." [5]

As indicated by this history, Chef Sweetman affirmed that he has "opened new kitchens and gone through a staffing up process for a new restaurant" on "multiple" occasions, in which he was "directly involved in the hiring of the kitchen staff." Tr. 2385. Against this background, he was asked the question: "[W]hat [do] you look for when you're hiring kitchen staff," to which he responded: "We always look for people that want to be super positive, make eye contact, smile – polished people . . . people who fit into our culture have similar values, [and] express an excitement and willingness to work." Tr. 2386. Also in response to this question, he stated: "We need people that are also qualified for the specific position, their job duties that they're applying for." Id.

Chef Sweetman then testified to the differences between the previous restaurant in the old Hotel Bel-Air, in contrast to the Puck-branded restaurant in the new Hotel. While acknowledging he had no "connection" to the former restaurant, Sweetman did have knowledge of its reputation, having worked for several years at that point in the Los Angeles culinary world. Tr. 2401. He testified with simplicity: "[T]he hotel wasn't well-known for food or the food service." Id. He then referred, by way of distinction, to Chef Puck as a "star chef," as well as to other chefs in this category – referring mainly, throughout his testimony, to Alain Ducasse, Thomas Keller and Jose Andres. He was then asked the following questions:

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[5] Following his work at Hotel Bel-Air, Chef Sweetman worked for four-plus years as a personal chef to Oprah Winfrey. Id.

Q When you say "star chef," that's a term of art, I think, in your industry. Could you explain for Her Honor what that means, a star chef?

A It's an elite group of chefs that are well-known for quality, and that's – that's pretty much what they do.

Q Based on your knowledge of the *former hotel restaurant's reputation*, was that a *star chef restaurant*?

A *No*. No, it wasn't.

Q Could you describe for Her Honor the *difference* between a *star chef restaurant* like Wolfgang Puck and a restaurant that is *not a star chef restaurant* like the one at Hotel Bel-Air previously?

[Objection made and overruled]

Tr. 2401-02 (emphasis added).

THE WITNESS: Okay. It's typical for a chef like Wolfgang Puck to focus on ingredients and look for ingredients; say go to a farmer's market on Wednesday in Santa Monica, rather than have a Sysco food truck pull up and just drop off products.

Then *the way that you handle those products is to be respected* from the *bottom* all the way to the – to the *final user*. So as examples . . . we would have a butcher that would cut the meat and grade the meat and take care of the meats, as opposed to bringing in pre-cut products and things of that nature. And it goes along that *same line of thinking for every single step in the process*; how the dishes are put away . . . There's a thought process and *an honoring of a craft*.

Tr. 2403-04 (emphasis added). Chef Sweetman then responded to the question of the skill sets required by a "star chef" restaurant, and whether those skills were "different from or higher than [those] required in a *non-star* restaurant," like the old Hotel Bel-Air? He responded:

A Absolutely.

Q And how so?

A You can learn . . . the right way to do something, or you can learn the wrong way to do something. And if you're in a kitchen like a Wolfgang Puck or a Thomas Keller or Alain Ducasse, there's going to be a lot of ***systems*** put in place to make sure that you know exactly to do something, exactly how long it should take from the mise en place of your station, to the grading of each ingredient and putting those – mixing those ingredients properly, and the ***amount of talent*** from the ***chefs*** that ***lead the team***, all the way ***down to*** the – to the ***final employee***.

Tr. 2403-05 (emphasis added).

Q Now, in the process of hiring employees, chefs, line cooks, down the line [,] for a star chef restaurant [,] as opposed to a ***non-star*** chef restaurant, are you looking for a higher skill set to perform the work that goes on in a star chef restaurant?

A A hundred percent . . . best qualified, best background. Where they had worked before would be very important.

Q So you look at where they had worked before.

A Hundred percent.

Tr. 2406-07 (emphasis added).

Chef Sweetman was directly involved in the hiring process for the Puck-branded restaurant that opened in the new Hotel Bel-Air. He participated over *all three days* of the July 26-28, 2011 job fair, Tr. 2399, conducting departmental interviews (*i.e.*, the second-level interview, the details of which will be discussed in the next section of this brief). He was asked: '[W]hat kind of prior experience were you looking for that would have impressed you in terms of their application?" He responded:

A There's things like apprenticeships that you can go to. There's the American Culinary Federation, which is a society of chefs which . . . helps cooks grow. There's culinary schools all over the country. There – and then there's [having worked with] any of the chefs with five-star restaurants would do well.

> Q So if they had worked in another five-star restaurant, that would be a plus in their application for the Wolfgang Puck restaurant?
>
> A Hundred percent . . . Especially if we could get one from a person like [star chefs] Thomas Keller or Jose Andres in the city. I mean, that's a big deal for us because, not only have they been trained the way you would want them to be, but they would also have a slightly different skill set.
>
> Id.
>
> Q *Did work experience in* the old kitchen of *the old restaurant* in the old hotel, would that experience be the *equivalent of working for a Thomas Keller* or working *for a Jose Andres*?
>
> A It would *not be similar to* working for Thomas *Keller* or Jose *Andres*, but it would be a background that I would look at and say, okay, they were in a hotel environment.
>
> Tr. 2408.

Of major significance to the issue in this case, Chef Sweetman testified that after spending three full days doing departmental interviews, during the July 26-28 job fair, he was not satisfied with the overall quality of the candidates up to that point in terms of their skill sets (even though *some*, including former Bel-Air employee-applicants, *were* hired [6]). Chef Sweetman testified: "We were *not* satisfied, and we continued to try to find qualified applicants." Id. (emphasis added).

E. The Selection Process.

The Hotel upon re-opening needed to regain its five-star Forbes rating. To achieve this goal – as stated by witness Steven Boggs, above – "you better be great, not good," as this is a

[6] Antonio Miramontes (Tr. 2422-24); Miguel Moran (Tr. 2445); and Jorge Osorio (Tr. 2452). And see, complete list of those hired, in section E below.

goal calling for more than just a gorgeous building filled with beautiful objects and serving up delicious meals. It is, instead, the quality of the selected employees who determine whether a hotel is only "good," earning four stars, or whether it achieves the 'greatness' necessary for the coveted fifth star.

Maria Carmelita Lukey (referred to in the record as "Milet Lukey") became the Dorchester Collection's Area Director of Human Resources just a few weeks prior to the July 2011 job fair, with responsibilities over both Hotel Bel-Air and the Beverly Hills Hotel. Tr. 507-12. She had been transferred by Dorchester from its New York City hotel, the New York Palace Hotel, where she had served as the director of human resources since 2009. Ms. Lukey had worked previously, for twenty years, in human resources for numerous Ritz Carlton hotels. Tr. 544-45.

Her initial task, upon arrival in Los Angeles, was to manage the hiring process for the new Hotel Bel-Air. Tr. 507-12. In testifying to her efforts in managing this, she began by describing the key ingredient of what make a hotel 'great,' not just 'good' – its people:

> We like certain people for some reason or the other. And we would choose to go to a place or patronize a place because there's just this quality that you feel good about being in that hotel or in that restaurant. ***It's that person that makes the experience really stand out***. And I think in luxury property it's even more ***paramount*** that ***we look for*** ***those qualities***, because the ***guests have*** very ***high expectations***.
>
> When they pay a certain amount of money to stay at the hotel, they expect the service to be ***flawless***, they expect the service to be basically ***seamless***.

Tr. 549 (emphasis added).

"Who would want to go check in to a hotel," Ms. Lukey went on to observe, "where people were not happy?" Tr. 551. Each contact with the guest – from checking-in through the

departure – is important, she explained. Success depends on hiring people-friendly employees motivated to ensure "that this guest has an amazing stay." Id.

The central purpose of any hiring process, in any industry, is to select those persons with the skills needed for a particular job. In the hotel industry, particularly at the luxury end – as Ms. Lukey's testimony made clear – the most necessary skill could be called a love of the human race. Apart from those skills needed to provide the usual hotel services – making beds, cooking omelets, etc.; skills which can be learned and taught – hotels seek that certain skill, that natural inclination, for warmth and friendliness. "This is something that's natural," Ms. Lukey testified. "It's not something that you can fake." Tr. 551.

And so, when undertaking the Hotel's re-opening, the goal was to identify, she said, those who "love service . . . love this profession, and . . . [who] get a kick [out] of being able to recognize the guest, [and] knowing what their preferences are," and who show up for work and say, "'Great, I have an opportunity to . . . make an impact on somebody's stay'." Id.

"So that comes out in your demeanor" when interviewing, she testified, and "it comes out in your attitude, it comes out in your smile." Id. "[I]t's the emotional connection . . . that we are looking for. So, when you're looking at someone . . . during this interview process you really just want to get that sense of . . . do they have the energy, do they have the natural liking for this job or for this industry?" Tr. 552. Some persons have this skill or inclination in abundance – some not so much, or as Ms. Lukey stated: "Because it's not for everybody. It's a very hard industry, actually, when you think about it. It's seven days a week, 24 hours a day, and it doesn't ever stop." Id.

The skills needed for superior hospitality at the luxury level call for more, however, than just a warm and friendly demeanor. Of equal importance is the desire to be of service, and

to be helpful in solving the problems of others. This characteristic relates to Ms. Lukey's above-quoted testimony concerning the high-dollar guest expectations for "the service to be flawless . . . [and] basically seamless."

She explained: "[B]y seamless, I mean . . . there is no, 'Oh, I can't make a decision on that. Let me check with my supervisor'." Tr. 550. Instead, Ms. Lukey testified, "we try and empower the employees" to solve problems on the spot. To that end, the employees of a luxury hotel are given guidelines or "factors" governing how and when they "can make a decision" that will solve a guest's problem (*e.g.*, a meal not meeting expectations; a guest room not ready when promised; a delay in room service, *etc*.). Id. The message to employees, she testified, is: "'We will back you up, up to' – I believe it was $3,000 . . . We empower you to do that decision because it's important for the guest to have that seamless experience." Id.

The value of this empowerment, she testified, lies in the opportunity to convert a guest with a problem into a "loyal customer or a guest." Id. In explaining the dynamics of this opportunity, Ms. Lukey indicated first that many high-dollar guests "just take it for granted" that their hotel experiences will be flawless and seamless. "[O]ur opportunity really is when they have a problem . . . and you turn the guest around, meaning that you solved the problem." Id. But more critical to the selection process, she went on to say, it's not just "about throwing money or comping . . . the meal or comping the room, *it's about really listening to the guest* . . . *and ensuring* that we are going to take steps in order to ensure that *that problem is corrected* and it doesn't happen again." Tr. 550 (emphasis added).

* * * * *

The Hotel's selection process was initiated by the afore-mentioned three-day job fair, which was held over July 26 through 28, 2011. The job fair was expressly designed to identify

and select those candidates who fit the above-described needs of a luxury hotel – *i.e.*, warm and friendly personalities, the desire to be of service, and a capacity for "listening to the guest" and solving problems.

The three-day July 26-28 job fair was advertised in a local newspaper. Tr. 518-20 (Lukey, recalling to the best of her memory the ad was in the Los Angeles Times); see also, **Exhibits GC-6** and **7** (two copies of the advertisement). While the precise number as to how many applied is not nailed down in the record, the record nonetheless indicates clearly that well over a thousand (1000+) candidates applied. Tr. 541 (Lukey, testifying to "over 1000"); see also, Tr. 1875 (human resources manager Sandra Arbizu, who helped run and was present all three days of the job fair, when asked to give her "best estimate" of how many applied, testified: "There were so many. I'm thinking we had at least over 700, 800, perhaps come within [the] three days [of the job fair], if not more").

In addition, as the record reflects, candidates continued to apply, following the job fair, at a construction-site trailer on the Hotel's property. See, *e.g.*, Tr. 2408 (Chef Sweetman, discussed above, describing his continuing efforts to interview qualified applicants given the unsatisfactory quality of candidates during the job fair) and Tr. 2307 (Rangel, discussed below, describing her continuing efforts following the job fair). In addition, as shown by **Exhibit R-7**, approximately 24 of the total number of former employees who applied – addressed next – submitted applications applied on dates that occurred *after* the three-day job fair.

The thousand-plus applicants were vying for approximately 306 open positions. Tr. 536. One-hundred and seventy-four (174) of the applicants were former Hotel Bel-Air employees. Tr. 596; and see **Exhibit R-7**, and Tr. 589-604.

Of the 174 former employees who applied, Milet Lukey testified to a best recollection while on the stand (without being shown any records) that 24 of the former employees were offered jobs. Tr. 540. However, in fact, the record reflects that 29 were hired (16.9%), as shown by the following list taken from the payroll record introduced in evidence as **Exhibit GC-53** (covering the period from July 2011 through February 2012). All of the names in the list below appear on **Exhibit R-7** – the list referred to above showing the names of the 174 former Bel-Air employees who applied. Shown here also are the payroll dates of hire and the position filled (each of which was a former bargaining-unit job, as confirmed by reference to Appendix A to the former CBA, at **Exhibit GC-3**; the dates and positions are found on **Exhibit GC-53**).

Former Hotel Bel-Air Employees
Who Applied (Exhibit R-7)
and Were Hired in First Four (4) Months of Operation (Exhibit GC-53)

1. Avalos, Jose Noe - 09/20/2011 - Steward
2. Barragan, Ignacio Armando - 08/29/2011 - Engineer-3
3. Baumann, Barbara- 09/05/2011 - Concierge
4. Cairns, Alastair J. - 09/16/2011 - Bell person
5. Campos, Guillermo Milton - 08/29/2011 - Engineer-4
6. Casanova Magallanes, Carlos - 09/20/2011 - Bell Captain
7. Chen, MeiFeng - 11/02/2011 - AM Room Attendant
8. Flores, Oscar Humberto - 09/20/2011 - Cook II
9. Garcia, Jose De Jesus - 09/16/2011 - Cafeteria Attendant
10. Guadron Mendoza, Sonia J. - 08/29/2011 – Housekeeping line supervisor
11. Huerta, Felix - 09/16/2011 - Restaurant Server
12. Landers, Lucinda R. - 09/05/2011 - Restaurant Server
13. Laulette, Dawn Marie - 12/02/2011 - Concierge
14. Long, Bisetha - 08/29/2011 - Housekeeping line supervisor
15. Luc, Mina Thuy - 09/05/2011 - Housekeeping line supervisor
16. Luna, Gerardo - 11/11/2011 - Restaurant Busser
17. Marquez, Juan A. - 09/20/2011 - Bell Captain
18. Mendez, Clemente - 08/29/2011 - Cashier
19. Miramontes, Antonio - 09/20/2011 - Steward
20. Moran Diaz, Miguel A. - 09/13/2011 - Clerk-receiving
21. Munguia, Jose Emilio - 12/01/2011 - Servers-banquets Extra

22. Osorio-Garcia, Jorge Adolfo - 09/20/2011 - Steward
23. Perales, Raudel R. - 08/29/2011 - Engineering line supervisor
24. Portillo, Rafael E. - 09/16/2011 - Servers-banquets
25. Presa, Rafael Rolando - 08/29/2011 - Engineer-3
26. Torres, Maria Del Socorro - 09/16/2011 - Dispatcher
27. Tunac, Ronald Melecio - 09/05/2011 – Front Office Agent
28. Urbina, Eleuterio Eric - 09/05/2011 - Restaurant Busser
29. Vea, Humberto - 09/01/2011 - Room Service Captain

* * * * *

The job-fair advertisement stated: "We are looking for exceptional talent to join the legendary Hotel Bel-Air as it re-opens this fall after a multi-million dollar renovation." The ad declared with justification and confidence that the new Bel-Air "undoubtedly will be one of the finest hotels in the world." The ad copy went on to describe the essential qualities of the applicants sought by the Hotel:

> Candidates must have a passion for excellence, a warm, friendly and positive attitude, and strong verbal communication skills. Previous luxury hospitality experience and the ability to thrive in a fast-paced environment is desirable.

Exhibits GC-6 and **7**.

Three key features of the selection process were identified by numerous witnesses, without contradiction:

- First, the former Hotel Bel-Air employees – *i.e.*, those employed as of or around September 30, 2009, when the Hotel was closed down – were sent letters from the Hotel notifying them of the planned re-opening, set for October 14, 2011 (as stated in the letter, and as actually happened), and that the three-day job fair would be held over the dates of July 26-28, 2011. The morning of the first day, July 26, they were informed, would be set aside only for former employees, with candidates from the general public invited in that afternoon and over the two following days (consistent with the

advertisements – see **Exhibits GC-6** and **7**). An example of the form letter that was sent to the former employees is in the record as **Exhibit GC-13**. These letters issued out over a week in advance of the job fair (the referenced Exhibit is dated July 15, 2011).

- Second, most of the interviewers had not been previously employed by the old Hotel Bel-Air, as Ms. Lukey confirmed without contradiction. Tr. 554 ("I think there might have been a couple that were there before . . . But most of them were newly hired for the reopening of Bel-Air as well"). See also, Tr. 554-560 (Lukey's identification of many of the initial/screening interviewers, showing that most had no prior Bel-Air experience, though as to some names she lacked memory). Accordingly, these interviewers with no prior Bel-Air experience had no personal knowledge concerning the former employees sitting across the interview tables, including an absence of any knowledge concerning union support or lack thereof. [7]
- And third, the personnel files of the former Hotel Bel-Air employees were not relied upon or referred to at any point during the hiring process. No witness who participated as an interviewer testified to ever reviewing or referring to the personnel files at any point during the process. Several witnesses indicated their understanding that the files

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[7] The only interviewer-witness who had been employed at Bel-Air in 2009 was **Maria Rangel**. Her testimony is discussed below. Many of the interviewers, like **Porfirio Camaal**, were managers from the Beverly Hills Hotel. Mr. Camaal worked in accounting at the Beverly Hills in 2009, at which time the two Hotels were not sharing services, as shown by the discussion of his testimony below, and showing his testimony that he had no knowledge of any of the former Bel-Air employees he interviewed in 2011. **Stephen Boggs**, as shown above, did work at the Bel-Air previously, but his last year there was in 2001, and in addition, Boggs did not interview employees at the job fair; he was a greeter (Tr. 1664).

Chef Sonny Sweetman, the key interviewer for all of food & beverage, as shown above, had no prior Bel-Air experience, and – as shown below – **Christophe Moje**, the final interviewer, had no prior Bel-Air experience. And, of course, as shown, **Milet Lukey** had no prior Bel-Air experience. Lastly, and of significance, the 2009 Bel-Air General Manager, **Tim Lee**, although still employed in 2011, took no part in any of the hiring decisions (he served as only a greeter in the job fair). Tr. 1894.

had been stored off-site, a fact confirmed by Milet Lukey. Tr. 579-81 (the interviewers "did not use any" of the files; Lukey herself "did not have access to" the files; and Lukey did not recall anyone ever asking her to see the files).

Ms. Lukey testified, further, that no personnel files from any other employers were viewed either. Id. When asked to "explain to the judge the methodology . . . in the selection process of not considering any of the prior human resources files, especially for the former Hotel Bel-Air employees," Ms. Lukey testified:

> A I believe the ***mission*** was to hire ***exceptional talent***, and that meant that it was ***anybody who would apply***, that they would be on the ***same treatment***, if you will, same process that they go through, irregardless of whether or not they were with the Hotel Bel-Air ***or*** whether they had ***experience somewhere else*** in another property. You know, it was simply based on that process that we have in place. There was no – there was ***no intent to find out***, you know, what the ***status of any of the former employees***. You know, it didn't even come to discussion at all.

Tr. 581 (emphasis added).

Ms. Lukey's reference to "exceptional talent," it will be noted, is echoed in the opening line of the afore-quoted ad copy for the job fair ("We are looking for exceptional talent"). Ms. Lukey's echoing of this "mission . . . to hire exceptional talent" is consistent with the testimony above, and demonstrates that far more than mere lip service to 'hiring exceptional talent' was involved in the Hotel's re-opening business plan. This was a clearly identified goal, articulated plainly and with purposeful intent. It was a goal formulated within the legitimate province of this employer's business judgment.

The 'exceptional talent' at issue – the talent the Hotel's search was designed to find – involves the very real quality referred to commonly as personality. This is not an intangible. This is a quality which can be observed readily. The Bel-Air's selection process was aimed at

finding those candidates who possess the qualities described in the above testimony – true warmth and friendliness; an ease with a smile while maintaining eye contact; an ability to communicate clearly; and a true passion for service at the demanding levels of a world-class luxury hotel. These characteristics taken together constitute the exceptional talent that was desired by the Hotel.

The Hotel's business plan was to earn the Forbes fifth star shortly following the re-opening, and to establish itself as "one of the finest hotels in the world." These were lofty goals. Achievement called for a process designed to identify exceptional talent; a talent which only a relative few possess in abundance.

The right personality is the determinative factor for a luxury hotel, and the luxury-hotel industry, in this critical respect, is distinctly different from almost all other industries. Within most industries that one can name, personality may serve possibly as a tie-breaker between two equally qualified candidates. It is not, however, the leading characteristic measured and sought. For example, if a welder with a sour disposition has the right license and the demonstrated skills called for by an available position, and assuming there is no equally qualified candidate with a sunnier attitude, then that welder will get the job. The same is true for virtually every manufacturing job, as well as for construction workers, truck drivers, bus drivers, nurses, unskilled clerical, maintenance workers, low-end retail, and fast-food restaurant cooks and cashiers.

Personality, the right personality, is the leading characteristic measured and sought by luxury hotels. Indeed, this was the first characteristic considered by Bel-Air in the initial/screening stage of the interview process, as discussed and shown in detail below. And, importantly, this is a not a skill or characteristic that can be 'learned on the job.' In emphasizing

the significance of this characteristic, Ms. Lukey explained the importance to the luxury-hotel world of identifying, during a selection process, those who have the ability to create a great "first impressions":

> [I]t comes out in the way they interact with anyone, whether they . . . were being interviewed or not. So that ***genuine friendliness***, the smile, the ability to communicate, you know, do eye contact is something that is – was very important to get as the ***first impression*** [in the interview process], especially because, like we said, ***in our business, a lot of things happen on initial contact with a guest***.

Tr. 581-82 (emphasis added). Elsewhere, after first describing a personal experience she'd had recently with an upbeat, attentive restaurant server, Ms. Lukey gave the following testimony concerning the importance of "first impressions" to the interview process:

> So, I think that's the quality [referring to her recent restaurant experience] that we're looking for when . . . we're screening people, yes, ***but it's also first impression***. You know, you would expect that if you really, really want this job in a luxury property, you would do your darndest to make sure that you appear there in professional appearance, that you can almost stand out.
>
> Because if you have 1000 applicants, how do you stand out? Well, you stand out with the way you carry yourself, your personality, the way that you talk about your passion about – so that is going to resonate more . . . – obviously, it would be a given that there would be some experience for the job that you are applying for, but I think the one that stands out is indeed, you know, that warm, friendly, natural and it's genuine. That naturalness that we're looking for. Because this is something that cannot be taught. I firmly believe in all my years you either have it or you don't. And when you have it, it just – it's just great.

Tr. 553-54 (emphasis added).

Given the lofty goals pursued – the fifth star, and for a reputation as one of finest hotels in the world – Ms. Lukey accomplished her "mission . . . to hire exceptional talent" by extending her search beyond those who had been employed previously by the Hotel. Her field

of search was appropriately conducted – and legally so, as shown in the Argument section below – without regard to "whether or not [the candidates] were [employed] with the Hotel Bel-Air" previously, "or had experience somewhere else." Tr. 581. Common sense, after all, dictates that not every former Bel-Air employee – by virtue simply of falling within that class – was possessed of the level of exceptional talent and personality which could be found by casting a wider net in the search for applicants.

Common sense dictates also that persons with such talent can be found in many places. While the job-fair ad copy indicated that "[p]revious luxury hospitality experience . . . is desirable," this statement in the advertisement was not limited to *hotel* experience (as the term "luxury hospitality" includes more than hotels, and is inclusive of at least the restaurant world), nor was it designated as 'mandatory' (only "desirable"). As Steven Boggs testified, above, two of his best employees came from backgrounds outside the hotel world – one from a gift shop and one from a bar. Tr. 1731.

* * * * *

The structure of the hiring process, as also described consistently by numerous witnesses, was simple. There were three levels of interviews: (1) an initial or screening interview; (2) a departmental interview; and (3) the final interview. The first two interviews took place at the job fair, however, interviews at these levels continued during the period leading up to the October 14 opening. In particular, as noted in section D, above, executive chef Sonny Sweetman with Wolfgang Puck testified he was "not satisfied" with the overall quality of the candidates who came forward during the job fair, and he testified that he "continued to try to

find qualified applicants." Tr. 2408. The final interviews were conducted by Christophe Moje, the Hotel Manager (second-in-command below the General Manager at the time, Tim Lee [8]).

Numerous witnesses testified to a training session for the interviewers that was led by Milet Lukey, prior to the job fair. Ms. Lukey identified the PowerPoint program, in the record as **Exhibit R-3**, that she used in conducting the session. The three-level interview process is outlined therein, consistent with the description above.

The most significant section in the PowerPoint program is on page 4 of **Exhibit R-3**, where the seven characteristics of the ideal candidate are listed, under the heading: "A Hotel Bel-Air Team Member Will …" Three of the seven are a mix of 'givens' and generalizations – *i.e.*, characteristics one would expect with most any hiring employer: meets job qualifications; demonstrates ability to uphold the Hotel's values and culture; and is appropriately attired and well-groomed. The four more important characteristics, reflecting the Hotel-specific values that Milet Lukey and others identified in their testimony, were the following:

1. "Displays a warm, friendly and engaging personality."
2. "Smiles with ease and maintains eye contact."
3. Demonstrates proactive problem solving skills."
4. Successfully communicates in a clear, confident and sophisticated manner."

One of the screening-level interviewers was Porfirio Camaal, an employee in the accounting department serving both Hotel Bel-Air and Beverly Hills Hotel. Like almost all

[8] As discussed in the preceding footnote and in next section, general manager Tim Lee was one of only a few Hotel Bel-Air managers who had worked in the old Hotel. Christophe Moje, who was new to the Hotel, was given the authority to make the final-hiring decision in order to assure objectivity in selecting the best hires. Tim Lee did not participate at any level of the selection process. During the job fair, Tim Lee was a greeter, not an interviewer. Tr. 1894.

interviewers at all three levels, Mr. Camaal had not worked at the Bel-Air prior to 2011 (see footnote 7 above, and accompanying text). He testified he did not "recognize" any of the applicants as "old Hotel Bel-Air employees." Tr. 2262. He explained, further, that the hotels did not share services prior to the 2009 closure, and that he was then working only at Beverly Hills. He stated: "I never met anybody from Hotel Bel-Air." Id.

Mr. Camaal testified that the training session led by Ms. Lukey hewed closely to the four above-listed, most important characteristics and values. Asked to describe the training session, he testified:

> A It was just to remind us . . . of our culture of what we are looking for in the personnel that we're going to be onboarding.
>
> Q . . . How would you describe the training for the hiring process?
>
> A It was just like, a PowerPoint presentation on – on re-energizing our memory or our minds of what we're looking [for].
>
> ***
>
> Q And do you recall when Ms. Lukey was describing what we were looking for in the personnel that we would be hiring? What did Ms. Lukey instruct you to look for?
>
> A People that are very – that are approachable, friendly. We were looking for smiles and could – and are well-spoken or can communicate with us.
>
> Q And during this presentation that Ms. Lukey gave, did Ms. Lukey ever make any comments about purposefully screening out candidates that were members of a union?
>
> A No.
>
> Q Did Ms. Lukey make any comments about purposefully not hiring people that had worked at the old Hotel Bel-Air?
>
> A No.

Tr. 2255-56.

Q While you participated at the hiring fair, did you observe anybody keeping track of the number of old Hotel Bel-Air employees –

A No.

Q – that were being either put through the process or not?

A No.

Tr. 2262.

Q Did whether or not somebody was an hold [sic – old] Hotel Bel-Air employee have anything to do with if you out them in the yes or no pile?

A No.

Tr. 2266.

Mr. Camaal described his responsibilities as a screener, and the process he followed, with the following testimony:

A We had a questionnaire that we needed filled out and basically it asked three questions, and from there we would assess if – that we were going to pass them on to the next stage of the hiring process.

Tr. 2257.

Q While you were completing the initial screening, did anybody come up to you and tell you, I've worked with this person, hire this person, or don't hire this person?

A No.

Q The determination, as an initial screener as to whether or not to put somebody in the yes pile or the no pile, was that completely your discretion?

A. It was an assess – yeah, an assessment of what we felt if we were to pass the initial candidate over to the department [-level interview].

Q And what are some of the characteristics that you, as an initial screener, relied on to make somebody go in – or to put somebody in the yes pile?

> A So we were looking for, obviously, smiles – people that were approachable, well-groomed, and can communicate clearly.

Tr. 2258-59

> Q So where it says [on the interview form] . . . those three questions, you would ask those three questions of every candidate?
>
> A For every single one, yes.

Tr. 2260. The three questions were set forth on the top half of the first page of the interview form used by all interviewers for all three levels – see, *e.g.*, **Exhibit GC-2**, pages 3 and 4. The three questions were:

- What position are you applying for?
- Are you available to work weekends/holidays?
- Why do you want to work for Hotel Bel-Air?

Mr. Camaal testified the screening interviews moved quickly. This was by design. Page 5 of the PowerPoint presentation, **Exhibit R-3**, suggested a 10-minute limitation, necessary due to the large number of candidates expected and who in fact showed up. Mr. Camaal was asked: "[W]hat kind of response were you looking for when you asked [the third question of] why somebody wanted to work at the Hotel Bel-Air? His response:

> A It wasn't really what they said or how they answered it. It wasn't what they said. It's how they answered it and are they communicating properly, did they understand the question. And – but it didn't really matter really why they wanted to work with us. It was more of an assessment of how they answered the questions.

Tr. 2261.

> JUDGE THOMPSON: What were you looking for in that assessment of how the applicant answered the [third] question?
>
> WITNESS: Their energy in how they – for me, they needed to sell it to me. Like I really want to work here. This is why. So, it was more the energy that they brought up to the table. If they were just – we did have candidates who would say [“] I need a job [“]. And so it didn’t really explain to me why you really wanted to be a part of our team or why you are going to be that perfect . . . piece of the puzzle to make us the family that we are as a company.
>
> JUDGE THOMPSON: Is it fair to say then, Mr. Camaal that it didn’t necessarily matter the length or – of the response, but how it was conveyed to you?
>
> WITNESS: Yes.

Tr. 2263-64.

Respondent encourages this judge to review the testimony of all the other witnesses who participated as screeners in the initial round of interviewers, and is confident of a finding that all testified consistently with Mr. Camaal concerning their duties, how the process worked, the fact that they were never instructed to minimize or control the number of former Hotel Bel-Air employees who were passed along, and the fact that the union or union membership was never mentioned in the planning and execution of the hiring process.

* * * * *

The next level of interviews – the departmental interviews – were largely conducted by departmental managers. Similar to the screening interviews, there were three set questions on the interview form. Departmental interviewers were instructed during the training process – in boldface, on page 6 of the PowerPoint presentation, **Exhibit R-3** – “**Please do not deviate from specified questions on form**.”

These three questions were aimed expressly at the goal of identifying candidates who exhibit the critically important capacity – described above in the testimony of Milet Lukey – to

be of service, to listen carefully, and to be helpful as a team member in solving the problems of guests and fellow employees. The three questions were the following: [9]

- "Give me an example of a time when you helped a guest with their question or problem?"
- "Tell me about a time you helped a co-worker in need?"
- Give me an example of a time when you successfully completed multiple projects or tasks?"

One of the departmental interviewers was Maria Rangel. Unlike most of the interviewers, at all three levels, Ms. Rangel had been a manager with the old Hotel Bel-Air. Both before and after the two-year shut-down, she served as the Front Office Manager, and in that capacity oversaw front desk agents, reservation agents, PBX (telephone) operators, bellman and valet parkers. Tr. 2299-2300. At the time of her testimony, however, Ms. Rangel was no longer an employee of the Hotel or of Dorchester. Tr. 2168. [10]

Ms. Rangel was present for all three days of the job fair. Tr. 2303. She was asked about the training by Milet Lukey prior to the job fair, but was asked also about *all other conversations* she had with any other managers, at any time, having to do with the preparation and planning for the hiring of new employees. Tr. 2300-03. She testified:

> Q Do you recall any of those managers in [the training] meeting ever making a comment to the effect that we need to minimize or control the number of former Hotel Bel-Air employees we hire?

---

[9] As shown, for example, on pages 3 and 4 of **Exhibit GC-2.**

[10] The fact that Ms. Rangel – as well as Ms. Lukey – were no longer employed by Dorchester at the time of testifying is, of course, an important consideration in assessing their credibility. Moreover, though, there is no material conflict between the testimony of either of these witnesses and those put forth by counsel for the General Counsel.

A No.

Q Do you recall any of those managers that you just listed ever, at any other point in time, make comments to the effect that we need to minimize or control the number of former Hotel Bel-Air employees we hire?

A No.

Q Do you remember, again with regard to any conversation you had with any of those managers that you just listed, do you ever remember any of those managers ever bringing up the word "union" or bringing up the topic of the union as it related to the hiring process that the hotel embarked upon?

A No.

Tr. 2302-03.

Ms. Rangel testified she conducted "probably over 50 to 75" departmental interviews, Tr. 2303, and testified she interviewed "every one" of the applicants passed to her by the screeners. Tr. 2304. She was then asked what she was looking in the candidates passed to her:

A I was looking for someone who had the same type of passion and enthusiasm for the industry and for the hotel as I and the rest of the team did, somebody who was willing to work, who was eager and energetic and presented themselves professionally and whom I felt would represent the Hotel Bel-Air for the vision that we had in the reopening.

Q And did you have sole discretion on who got passed to a second interview or were there some qualifications or conditions or anything that would prevent you from making your own decision in that regard?

A Once they were presented to me, I did have sole discretion as to whether or not they would be referred for a final interview or whether or not they would not be passed on for that final interview.

Q So if you rejected them at that point, they would be rejected and not proceed further?

A At that point, correct.

Q And so did you have to get anyone's permission to reject a candidate or to pass a candidate along?

A No.

Q No one reviewed your decision in that regard.

A No.

Q And so then the application – if you did pass the application, the applicant on, what happened then?

A They would then proceed to a final interview with Christophe Moje . . . Who was the hotel manager.

Q Okay. Was it your understanding, at least for your department, that Christophe Moje made the final decisions?

A Yes.

Q Along the same lines of the questions that I was just asking, did you witness any efforts by any manager to try to exclude any particular applicant?

A No.

Tr. 2305-06.

Ms. Rangel testified that her involvement in the hiring process extended beyond the days of the job fair:

A Beyond the job fair, I would have – it would've been my responsibility to ensure that everybody was hired for all the positions that we had to fill . . . pre-opening beyond the job fair. That would've been my main priority.

Q So you had a set number of positions to fill?

A Correct.

Q Okay. And were there any quotas as to whether a certain number had to be former Hotel Bel-Air employees or not?

A No.

Tr. 2307

Ms. Rangel, who testified on two separate days, was asked on the second day about a "personal philosophy" she had expressed on her first day of testimony:

> Q. . . . you spoke to your personal philosophy that anybody who had worked directly for me was capable of rehire; do you recall that testimony?
>
> A Yes, I do.
>
> Q But you didn't list that as a criteria for deciding whether to move a candidate to a final interview; is that right?
>
> A Correct.

Tr. 2306-07

The questioning then turned to specific old-hotel applicants. The first was Barbara Bauman: [11]

> A [Barbara Bauman] did not receive the letter informing her of the job fair as she was not a former employee when the hotel closed.
>
> Q When, to your recollection, did she leave the hotel?
>
> A She left after it was announced that the hotel would be closing but prior to the actual close date.
>
> Q Okay. Do you recall how many days in advance of the closing that the announcement was made to close the hotel?
>
> A I would say, from my recollection, I recall it being a few months.

Tr. 2308.

[11] The transcript records this name alternatively as "Bauman" and "Bowman."

Bauman, however, came to the trailers at the Hotel construction site after the job fair and filled out an application. She was seeking a concierge job; her former position. Ms. Rangel testified that this position had been filled. She went on to testify:

> A . . . We did have availability at the front desk, which was extended to her. She did apply for a front desk agent position, and she was hired as part of the opening team.

Tr. 2309.

> Q Did you also interview an employee by the name of Ronnie Tunac?
>
> A I did.
>
> Q . . . Tell us about your interview with Mr. Tunac?
>
> A Ronnie would have been at the job fair. And he was a front desk agent when the hotel closed, and he was hired back and was a member of the opening team.
>
> Q A member of the opening team on October of 2011?
>
> A Correct.
>
> Q Okay. And why did you – so I assume, from what you've said, you approved his application?
>
> A Yes.
>
> Q And why did you approve it?
>
> A Again, he was there when we closed, and as was my intention, anybody who wanted to come back to their –
>
> [*colloquy with the judge*]
>
> THE WITNESS: Yeah. Anybody who wanted to come back who applied, I would have hired back.
>
> Q BY MR. TERRELL: That was your personal view concerning your employees?

A That is correct.

Q *Did [Ronnie Tunac] have the requisite personal style and enthusiasm* and all the rest that you've previously described? Did he possess that?

A *Absolutely*.

Q Okay. And was the *same true with respect to Barbara Bauman*?

A *Yes*.

Tr. 2310-11 (emphasis added).

Another former employee interviewed by Ms. Rangel was Jehane Delewar, who served as a reservation agent in the old Hotel:

Q And did she interview with you at the second level in the hiring fair?

A She did, yes.

Q And how did she do in the interview?

A. She did not do well. She approached the interview very indecisive as to which position she would ultimately want to take. She approached the interview process in terms of more entitlement, [*as if to say*] what job do you have for me . . . I recall her very specifically being very frank, and did not have the passion as far as I had for being part of the opening team. It was very blah.

Q Blah?

A Blah.

Q Okay. Did you recommend her for a final interview?

A I did not.

Q So you did have this *individual personal philosophy* that you spoke about earlier that you were prepared to hire anybody who had worked for you?

A Correct.

Q *But* in this instance with Ms. Delewar, *you did not*?

A *That is correct*. She previous to the closure of the hotel, she was not a direct report to me. *I did oversee reservations after hours*. Jehane, at the time, did have a direct reservations manager who was her department head. I was not her direct department head. *But she was a former employee who did apply for a new position*.

******

A Her position as a reservations agent was not available at the time of the job fair . . . So, she applied for a new position which was not what she was doing, and *she lacked the enthusiasm*, and the *drive*, and the *passion* that *I was seeking* for my team, for my opening team.

Tr. 2314-16 (emphasis added).

Respondent encourages this judge to review the testimony of all the other witnesses who participated as department interviewers, and is confident of a finding that all testified consistently with Ms. Rangel, and Mr. Sweetman in section D, above, concerning their duties, how the process worked, the fact that they were never instructed to minimize or control the number of former Hotel Bel-Air employees who were passed along, and the fact that the union or union membership was never mentioned in the planning and execution of the hiring process.

* * * * *

Christophe Moje was the final interviewer and ultimate decision-maker on all employees hired prior to the reopening. Mr. Moje, like Ms. Lukey, had no prior Bel-Air experience, and also like Ms. Lukey, he did not arrive until July of 2011, when he took his new position there as the Hotel Manager (reporting up to the General Manager, Tim Lee at the time). Tr. 2550-53. As Hotel Manager, he had responsibility over all departments in the Hotel. Id. Although Mr. Moje had no prior work experience at the Bel-Air, he was familiar with the Hotel,

having stayed there a few times "purely" as a guest in the 1980s and 1990s. Tr. 2553-54. When he arrived at the Hotel, "fresh off the boat" as he put it, he did not personally know any of the managers who had been hired to work with him (with the exception of Milet Lukey, with whom he had worked at Dorchester's New York Palace Hotel). Tr. 2556-57. And, of course, he would not have known any of the former employees.

Mr. Moje served as only a greeter during the three-day job fair. However, after that and leading up to the opening, "80, 90 percent of [his] time was consumed with [the] interviews" he conducted, as the final interviewer. Tr. 2555. He testified to meeting briefly with Ms. Lukey prior to beginning these duties, and then testified as follows concerning what he experienced:

> Q . . . Did you witness, hear, or observe anything suggesting to you that there was a bias against hiring former Hotel Bel-Air employees or selecting for further interviews any former Hotel Bel-Air employees during the job fair?
>
> A I did not.
>
> Q Did you hear any reference to any kind of quote [sic – quota] or controlling the number of former Hotel Bel-Air employees?
>
> A No, I did not. We were just simply hiring the best fit, talent, and personality for the right job.
>
> Q Did you hear, witness, or observe any comments or actions in any way connected with any sort of agenda involving the Union?
>
> A No, I did not.

Tr. 2558-59. Mr. Moje was then asked about his knowledge of the union:

> Q Were you aware that the hotel had a union before its closure?
>
> A I was made aware of that, but I didn't have any deeper knowledge, nor did I have any concern.
>
> Q You didn't what?

A I didn't have any deeper conversations, knowledge, nor did I have any concerns about that.

Q Okay. Were you aware of any kind of, I'll just put a label on it, labor disputes – very general term – but did you have any awareness of any kind of labor dispute?

A I was aware that there was one, but I didn't have any details about it.

Q Did you know what the issues were?

A I did not know what the issues were.

Q Did you have any conversations that you recall about the nature of the so-called labor dispute?

A No, we were just hiring for the right fit, talent, personality. That was really the agenda because we only had six weeks until the opening.

Id.

Mr. Moje testified the final interviews were conducted mainly in the trailer-office while the construction was being completed, and that his interviews continued into August, September and October. Tr. 2563. He testified candidates were provided to him by the human resources office, and that he exercised no control over who he interviewed. Tr. 2564. He testified further that on no occasion did he review documents provided to him by human resources, and decide not to interview a candidate. Id. Finally in this regard he testified he was the sole decision-maker, with sole discretion, as to every candidate. Tr. 2564-65.

In addition, he confirmed, as have all other interviewers, that at no time did he review any of the old personnel files. Tr. 2574. Further describing his interview process:

Q. Did you talk with any of the departmental managers about any particular candidates?

A. No, I just did the interviews. And then I had the recommended hiring or not.

Q. Did you ever become aware of any action or decision not to hire an applicant because of his or her former Hotel Bel-Air status?

A. No, I did not.

Q Did you base your decision, in any way, on whether or not the employee was a former Hotel Bel-Air employee?

A No, I did not. I solely went through my questions and determined if it has a right and natural fit, excitement to be at Bel-Air that hospitable, warm, engaging personality. That's what I was looking for.

Q Okay. In your personal interviews, did you ask any questions relating in any way to the Union?

A No, I did not.

Q Did you have any discussions with any other managers about any particular candidate, or any candidate's affiliation with the Union?

A No.

Q Did you care?

A No, I did not. I was trying to find the right person and the right personality for the – for these jobs to fill.

Tr. 2565-66.

Consistent with the testimony of chef Sonny Sweetman, at the end of section D above, Mr. Moje testified that the Hotel "had a hard time to find sufficient applicants for the food and beverage department," and stated also "we didn't get enough qualified applicants." Tr. 2570-71. He indicated that both Sweetman and Tracey Spillane (another Wolfgang Puck manager) became involved in the latter stages of final decisions for that department, in the context of describing the food and beverage department as "a very chef-driven operation, which requires

a very specific talent to comply with the very high food and beverage operation, a very high end. *It was very different from what we had before*." Tr. 2571-72.

F. The Absence of Evidence of Union Animus

As shown by the testimony cited and quoted in sections D and E, above – including witnesses Sonny Sweetman, Porfirio Camaal, Maria Rangel and Christophe Moje – at no point were the interviewers instructed to minimize or control the number of former Bel-Air employees hired or passed along to the next level of the interview process. Each witness (including all those not quoted, but whose transcript-pages of testimony have been provided above) testified consistently to having sole discretion in deciding whether to pass an applicant along (and, in Moje's case, to make the final decision), and testified, consistently as well, that the union – or the question of union membership – was never even mentioned at any point during any of the planning and execution of the hiring process. As Maria Rangel testified, there were no "quotas as to whether a certain number had to be former Hotel Bel-Air employees or not." Tr. 2307.

Further ensuring a neutral, non-discriminatory process is the fact, as shown, that almost all of the interviewers had no prior Bel-Air experience. The sole witness falling outside this category was Maria Rangel, whose testimony is described above; and see also, footnote 7 and accompanying text, above. These interviewers, accordingly, had no personal knowledge as to the inclinations of these former-employee candidates concerning the union, or whether they had any close affiliation with, or were supporters of, the union. Significant also, in this regard – as the testimony above shows – each manager/interviewer exercised independent discretion to either accept or reject candidates. In addition, because the

interviewers did not have access to the personnel files of these candidates, they were further shielded from the possibility of discriminatory animus creeping into the process.

The selection process was carried out, instead, with a singularly laser-like focus, as shown, on only the core identifiers of the "exceptional talent" and personality then being sought, all in pursuit of the business-judgment goal of gaining the Forbes fifth star, and in establishing its future reputation as "one of the finest hotels in the world."

Milet Lukey, during her employment with Ritz Carlton for twenty years and with Dorchester, had experience working in both union and non-union environments. Tr. 543-45. Dorchester's New York Palace Hotel, from which she had just arrived in 2011, is a union hotel, and she had worked also in unionized hotels for Ritz Carlton in San Francisco and Hawaii. Id. Her initial, primary mission upon her arrival in Los Angeles was to oversee and manage the Hotel Bel-Air hiring process. When asked whether an "applicant's former membership in a union" factored into "any decisions that [she] supervised," Ms. Lukey testified: "Nothing at all. Didn't play in any of the process or discussion. It didn't even come in." Tr. 542. Moreover, she affirmed, she did not "care whether anybody had been in a union or was in a union or was in favor of a union." Id. These affirmations, though conclusory in form, must be credited in view of the complete absence of any other testimony to the contrary.

Indeed, not a single witness called by the counsel for the General Counsel testified to any statements made by any supervisor or agent of Dorchester, indicating even a whiff of union animus.

Not only that … the one witness called by the CGC who would certainly have been motivated to unearth such evidence – the charging party's Organizing Director Austin Lynch, with Local 11 – squarely admitted that he had *no* knowledge of any evidence of an union animus

motivating the hiring decisions made by Hotel Bel-Air. Mr. Lynch was cross-examined on statements he made under oath in a J*encks* affidavit that he gave on March 16, 2012 – four months after the Hotel re-opened, and within weeks of the filing by Local 11 of the single ULP charge in this case. After acknowledging that it was the union's "position" that Hotel Bel-Air had discriminated in its hiring for the re-opening, Mr. Lynch was asked the following question, concerning a statement he made under oath in the 2012 affidavit:

> Q. However, you were not aware of any statements, at least at the time you gave this declaration, this affidavit, you were not aware of any statements by any manager or supervisor of Hotel Bel-Air to the effect that Hotel Bel-Air was going to discriminate in hiring employees? That's a true statement, isn't it?
>
> A. You're asking me about events –
>
> Q. I'm asking you about your knowledge –
>
> A. That's six years ago, but --
>
> Q -- at the time you gave this affidavit, you did not know of any statements by any manager or supervisor of Hotel Bel-Air to the effect that Hotel Bel-Air was going to discriminate in hiring employees? I'm just simply --
>
> A I don't remember.
>
> Q — asking if that's a true statement?
>
> A. I don't remember. I mean, there's, you know –
>
> Q. You did –
>
> A. It was years ago.
>
> Q – know that in March of 2012, right, because you wrote it in your affidavit and you signed it?
>
> A Can I review my –
>
> Q Sure. It's at line 7 and 8 on page 2.

A Okay.

Q Okay, then yes you did say that at that time?

A Yes, I did.

Q *And that was the truth when you said it at that time*?

A. *Yes*.

Tr. 640-41 (emphasis added). [12]

Coupled with the fact that Lynch, *in the remainder of his testimony and on direct examination*, failed to provide *any* testimony or evidence supporting a notion that the hiring decisions of the Hotel Bel-Air were motivated by union animus, his testimony as a whole constitutes a four-square admission by the charging-party union that it has no such evidence. It had no evidence of animus on March 16, 2012, when Lynch gave the *Jencks* affidavit, and it had no evidence of animus when he was called to testify on March 22, 2017.

It is notably telling also that no single former-hotel employee has ever stepped forward and filed an unfair labor practice charge of their own, alleging under 8(a)(3) that she or he was discriminatorily not hired based on union support or affiliation. We know this to be true, as the only ULP charge at issue in this case is the one upon which the complaint was issued – ULP charge no. 31-CA-074675, filed by only UNITE-HERE Local 11.

[12] The complete statement, as it appears in the redacted Jencks affidavit, **Exhibit R-9**, reads: "Around July 2011, several former employees of HBA told Local 11 that HBA was sending them letters asking them to re-apply for their jobs. The Union's position is that HBA discriminated in re-hiring in order to avoid having to recognize the Union. *I do not recall any statements made by any manager or supervisor of HBA to the effect that HBA was going to discriminate in hiring employees.*"

Perhaps not surprisingly, in light of this last fact, is the fact that over one-hundred (100) employees filed a decertification petition in September of 2009, when the Hotel was still open and running. Tr. 658 (Lynch admitting his awareness of this), and see **Exhibit R-75** (the RD petition, consisting of 15 pages with signatures redacted but with dates showing – all of the dates, with two exceptions, were in the last week of September 2009; the two exceptions were dated October 1).

An additional indicator that Hotel Bel-Air was not motivated by union animus stems from the fact that Local 11 frequently picketed the Hotel in 2009, 2010 and 2011. Notwithstanding these actions by Local 11, the Hotel nonetheless hired some of the former employees who openly participated in this picketing. This fact was established by the testimony of a CGC witness, Amanda Escobar:

> Q Ms. Escobar, isn't it true that in 2010 and 2011, employees participated in UNITE-HERE Local 11 picketing in front of the Hotel Bel-Air that were hired anew after the hotel opened?

Tr. 1651. This question drew an objection on the grounds of relevance, coupled with an assertion of a *Berbiglia* privilege. The objection was also premised, as asserted by the charging-party counsel, on the "General Counsel's theory of the case . . . [as] one of generalized animus toward former employees who reapplied." Tr. 1652-53. This judge, nonetheless, correctly overruled the relevance objection, and allowed the question on the ground that it was "relevant to the Respondent's burden in this case," but sustained the objection to the extent of not allowing inquiry as to the identities of the picketing individuals who were hired. Id. And so, the question was asked again:

> MS DOWELL: Ms. Escobar, you are aware of individuals that participated in union picketing before the hotel reopened that were hired after the hotel reopened, correct?

A. True.

Tr. 1653.

It should be noted that the picketing in question, according to Local 11's Organizing Director Austin Lynch, was carried out "on many occasions from the time of [the 2009] closure through and including – well, to the present," and that these incidents of picketing occurred "in front of the hotel," as well as throughout the quiet streets of the Bel-Air neighborhood. Tr. 628-29 (stating the picketers "marched" from the Hotel "to Sunset Boulevard"). This tribunal will recall, also, the frequent questions by the charging-party's counsel, directed to Hotel management employees on cross-examination, seeking to establish (and doing so successfully) that these management witnesses were aware of the picketing. The conclusion is unavoidable, therefore, that Hotel Bel-Air was utterly unconcerned – when hiring, in 2011 – over the fact that it was re-employing individuals who had actively shown their participatory support of the union.

It should be noted, also, that the testimony of Ms. Escobar establishes that the number of picketing individuals who were hired was *at least* more than one, as the question framed by Ms. Dowell – both times, as quoted above – referred in the plural to those who were involved and who were hired. (Tr. 1651 & 1653: respectively, "employee**s**" and "individual**s**").

Mr. Lynch testified, based on these demonstrations, that Local 11 presently represents the employees of Hotel Bel-Air. Tr. 617 (answering affirmatively the question, "does the union represent the employees at Hotel Bel-Air?"); see also, Tr. 638. Counsel for the General Counsel takes this position as well. When responding to an objection to a question she had placed to Lynch, concerning the organizing of "actions or protests involving unit employees," Ms.

Gancayco asserted: "The purpose of this question is to establish . . . the union's ongoing representation of the employees since 2009." Tr. 626-27.

Nonetheless, as Mr. Lynch admitted, his union has never demanded recognition from the Hotel. In response to a question placed to him directly on this issue – "[Y]our union also hasn't made any demand for recognition, isn't that correct?" – Mr. Lynch attempted to duck by giving an answer, stating, "[i]n our view, we represent the workers today and we've shown that in a number of ways, including continuing to organize actions …" Tr. 637-38 (no other "way," however, was articulated by Mr. Lynch). When asked the question a second time, he responded, "I can't answer definitively if we have or haven't." Id. He was then pointed to two statements made in his 2012 *Jencks* affidavit: "I have not sent any correspondence or made any phone calls demanding recognition from Hotel Bel-Air" – and – "I do not recall whether Local 11 has made any demands that HBA continue to recognize the union." Tr. 638-39. Lynch admitted that he made those statements, and testified to nothing indicating the making of any subsequent demands for recognition.

The Hotel Bel-Air's management team, nonetheless, was aware of Local 11's aggressive picketing at the Hotel, as this was addressed in a letter to the union sent by the Hotel's area general manager, Edward A. Mady. The letter, on Hotel Bel-Air's letterhead, is in the record as **Exhibit R-8**, and was authenticated by Local 11 witness Austin Lynch. Tr. 636-37 (the letter was produced by Mr. Lynch to Region 31, and was attached to Mr. Lynch's *Jencks* affidavit). The letter, unfortunately, was not dated. It is readily apparent, nonetheless – as Mr. Lynch acknowledged, at Tr. 635 – that the letter pre-dated Mr. Lynch's March 16, 2012 affidavit. It is equally apparent that the letter was written and sent *after* the Hotel had re-opened, given the context revealed by the letter – the letter, as shown below, called for an NLRB election and

referred in the present tense to the "employees of Hotel Bel-Air." The letter was addressed to Tom Walsh of Local 11, identified by Lynch as Local 11's president. Tr. 634. The letter, in its entirety, reads as follows:

> Dear Mr. Walsh:
>
> Local 11's executives want to organize the employees of the Hotel Bel-Air.
>
> You are attacking the Hotel [a reference to the picketing and other actions] to force us to help you organize the employees. The employees decide whether the Hotel is Union or not. Executives from the Union and the company should not decide whether employees are unionized.
>
> If you truly desire to represent the employees of the Hotel Bel-Air, then let the employees decide for themselves. In America, people vote by secret ballot to determine their choices.
>
> I offer your Union a secret ballot election within thirty (30) days supervised by the federal government. If the Union wins, we will negotiate a contract. If the Union loses, you will honor the wishes of the employees and respect their rights.
>
> I await your response.
>
> Very truly yours,
>
> Edward A. Mady

Exhibit R-8.

Mr. Lynch was asked: "Did your union accept this offer" to hold an NLRB-administered election. Tr. 637. An objection on relevance was raised, which was overruled following Respondent's counsel's response that the question "goes to recognition." Mr. Lynch then replied "No" to the question. Id.

Finally, the evidence shows Hotel Bel-Air was unmotivated by union animus by virtue of its action in expressly inviting the former Bel-Air employees to apply, by letters sent to their

homes well in advance of the late-July job fair. See, *e.g.*, **Exhibit GC-13**. The end result of this invitation, which included the necessary detail concerning the time and place of the job fair, was the fact that a substantial number showed up and filled out applications. The former employees, in addition, were given a first crack at applying, by setting aside the morning of the first day of the fair for them exclusively.

The Hotel was under no obligation to send these letters. As addressed below in the Argument section of this brief, no recall rights were in force, and there was no other legal obligation compelling Hotel Bel-Air to extend this invitation and notice in writing. Had it been the Hotel's intent to minimize the number of former employees re-hired, it stands to reason that these letters would never have been sent.

* * * * *

As noted above, Milet Lukey testified that she did not "care whether anybody [who applied] had been in a union or was in a union or was in favor of a union." Tr. 542. Mr. Moje gave the same testimony. Tr. 2566. In light of all the foregoing – (i) the Hotel's written notice of invitation to apply; (ii) the neutral design of the hiring process conducted mostly by managers with no prior Bel-Air experience, and who were given independent discretion to make the hiring decisions; (iii) the Hotel's offer to conduct an NLRB-administered election; (iv) the hiring of employees who participated in the picketing; and in view of (v) the decertification petition signed by over 100 employees, and (vi) the union's inaction in making a demand for recognition – it becomes plain to see that Ms. Lukey and Mr. Moje, indeed, truly 'didn't care' whether the employees wanted a union or not. They didn't care, first, because the Hotel's leadership truly believed – as stated in Edward Mady's letter – that it is "[t]he employees [who] decide whether

the Hotel is Union or not," and the Union should "let the employees decide for themselves." These statements by Mr. Mady were not mere lip service, or a posturing for effect. The totality of the evidence, showing a complete lack of union animus – *not a single statement in the record attributing animus to any member of the Hotel's management team* – weighs heavily against any such conclusion of "mere lip service." If the Hotel was genuinely motivated to keep the union out, there would be evidence showing this.

If one takes a more cynical view, however, one might speculate the Hotel's leadership 'didn't care' because Local 11 was simply ineffective as an organizer of its employees. Certainly, the evidence shown above – in particular, the decertification petition – can lead one to this conclusion. But even if one assumes that Ms. Lukey, Mr. Moje and the Hotel's management team, in their heart of hearts, would have preferred to run the Hotel non-union, that alone (assuming it could be proven) is plainly insufficient to support an inference of union animus as a matter of law, as discussed in the Argument section of this brief.

The inference permitted from this record, instead, is simply that of a company exercising its right to make a business judgment as to who it wanted to hire, so as to achieve its legitimate business goals – to gain the Forbes fifth star, and to establish itself as "one of the finest hotels in the world." This rightful exercise of Dorchester Collection's business judgment led the company to cast a wide net for applicants, and to set a fixed, well-defined and carefully pursued standard for its hiring process, focused on nothing more than hiring "exceptional talent." There is not even a taint of union animus found within all the evidence of the planning and execution of this hiring process.

The former employees were not in any manner excluded from this process, but neither were they given preferential treatment, as Dorchester was under no obligation to give such

treatment. In the end, though, close to 17% of the former-employee candidates were found to possess the exceptional talent the Hotel sought, and were hired.

G. The Relevant Facts of the First Hotel Bel-Air Case.

There is also no basis to infer union animus, in this case, on the findings and decision reached in *Hotel Bel-Air*, 361 NLRB 898 (2014), aff'd per curiam 637 Fed. Appx. 4 (D.C. Cir 2016), which replaced but adopted the vacated decision (by *Noel Canning*) in *Hotel Bel-Air*, 358 NLRB 1527 (2012) (referred to, hereinafter, as the first Hotel Bel-Air case).

The issue in this earlier case was narrow and technical, relating solely to the question of whether Respondent prematurely declared impasse in the effects bargaining initiated upon the closing of the Hotel in 2009. The reported record in that case shows, nonetheless, that the parties engaged in an extensive round of bargaining over a one-year period with multiple meetings and exchanges of offer. The ALJ decision identified approximately seventeen face-to-face bargaining sessions and meetings between the parties on the 'effects' issues created by the business decision to close the Hotel. Numerous proposals went back and forth between the parties on all of the issues raised, which included severance pay and the negotiation of a new contract. As the findings in that decision reflect, the union sought an enhancement of recall rights. The Respondent, as that decision shows, made several different offers on this specific issue, which would have provided an enhancement to recall rights. Nonetheless, in the end, no agreement was reached.

The expired CBA, negotiated and freely signed by Local 11 in 2006, in the record as **Exhibit GC-3**, provided for no right of recall after nine (9) months on layoff. See section 22.G (3) at page 28 ("Seniority shall be broken and employee status shall cease upon . . . (3)

Continuation upon layoff status for a period of nine (9) months or the length of his seniority, whichever is less").

The ALJ found that Respondent, after making a "last best & final offer" on April 19, 2010 – eight months into the bargaining – continued to hold discussions with the union into May and June. Although substantial bargaining had taken place prior to April 19, the ALJ found that sufficient movement thereafter was made to warrant his finding that impasse had not been reached, when it was declared in July of 2010, and Respondent then unilaterally implemented its April 19 offer. This finding was premised on the narrow legal proposition, as stated by the Board in its affirmance, that "anything that creates a new possibility of fruitful discussion breaks an impasse." *Hotel Bel-Air,* 358 NLRB at 1527, citing to *Pavilions at Forrestal, 353 NLRB 540, 540 (2008).* Flowing directly from this finding and conclusion, as a subordinate ruling, the ALJ found and the Board affirmed that the Respondent's unilateral implementation – by sending to employees the previously proposed severance payments in exchange for the previously proposed waiver and release agreement – constituted unlawful direct dealing.

The Board's remedy called for two affirmative actions, upon the request of Local 11: (1) the rescission of the waiver and release agreement; and (2) the resumption of bargaining with Local 11, but *only* as to "the ***effects*** on bargaining unit employees of the temporary shutdown of the hotel for renovation." 361 NLRB at 899 (emphasis added).

It is a matter of record with the Regional Director's office that compliance was achieved in the first Hotel Bel-Air case. A letter of compliance closure was issued on June 29, 2016. Administrative notice of this compliance closure *must* be taken by this judge, as set forth in the

margin below. [13] For convenience, a copy of the June 29, 2016 compliance-closure letter is attached to this brief (**Attachment A**).

The Hotel anticipates that General Counsel and the charging party will attempt to argue that the findings in the first Hotel Bel-Air case will somehow provide the necessary proof of animus which they have failed, spectacularly, to prove in the present case. There is no nexus, however, between the issue in the present case and the limited narrow findings of the first. The issue here – involving events two years *after* the effects bargaining began, in August of 2009 – deals solely with the decisions made in the summer of 2011, related to the hiring for the newly opened hotel. These decisions, as has been shown, were made through the exercise of independent discretion on the part of each individual interviewer. The great majority of these interviewers were brand new managers with the Bel-Air, and had no involvement whatsoever in the failed effects bargaining of 2009-2010 (there is, to be sure, no evidence anywhere in this record that any decision-maker for hiring had any involvement in the effects bargaining).

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[13] *See* NLRB Division of Judges Bench Book, §16-201 ("Judicial Notice of Adjudicative Facts"), which quotes as authority Federal Rule of Evidence 201, which in turn states, in part, initially: "The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be ***accurately and readily determined*** from sources ***whose accuracy cannot reasonably be questioned***." (emphasis added).

Section 16-201 includes also this statement from FRE 201: "The court: (1) may take judicial notice on its own; or (2) ***must take judicial notice*** if a party ***requests*** it and the court is ***supplied with the necessary information***." (emphasis added). The Bench Book at 16-201 includes also this statement: "Under FRE 201, adjudicative ***facts that are not subject to reasonable dispute*** may be ***given judicial notice*** (sometimes referred to 'official' or 'administrative' notice) ***at any stage of the proceedings***, with or without a request by one of the parties." (emphasis added). Finally, 16-201 provides these citations, relevant here: *"Drummond Coal Co.*, 277 NLRB 1618 n. 1 (1986) (an arbitral award issued ***after close of hearing***, despite party's objection). *See also Metro Demolition Co.*, 348 NLRB 272 n. 3 (2006) (***Board may take administrative notice of its own proceedings***)." (emphasis added).

Indeed, the great majority of these managers, again as shown, were not even employed by the Hotel Bel-Air prior to 2011.

By contrast, the issue in the first case dealt solely with the technicalities of whether impasse had been reached, as shown above.

Counsel for the General Counsel and the charging party are likely to attempt also to argue that a comment by the Board in the vacated 2012 decision offers support. Specifically, it is anticipated they will point to the Board's remark that the employees "retained a reasonable expectation of recall" between 2009 and 2011. See 358 NLRB at 1528. The anticipated argument, as premised, is remarkably flimsy, as it points to nothing more than speculation as to the subjective states of mind of the former employees between 2009 and 2011. Indeed, the Board itself observed, in this regard, that "contemplated changes in the hotel's business model made it less than certain that the Respondent would recall all of them." Id. The "expectation of recall" comment by the Board flies also in the face of the undisputed fact that the expired CBA – as shown and cited above – provided for no right of recall after nine (9) months on layoff.

The most basic problem with this argument is that the very limited remedy imposed by the Board – return to the bargaining table and resume the effects bargaining – has been accomplished. As noted just above, the Regional office has issued a compliance closure letter (Attachment A), which confirms that Respondent has performed to the Region's satisfaction the two affirmative remedies noted above – (1) the rescission of the waiver and release agreement [14]; and (2) the resumption of bargaining with Local 11, but only as to "the effects."

[14] The waiver and release agreements signed by employees were rescinded after the issuance of the 2016 decision of the D.C. Circuit Court of Appeals, affirming the Board's second decision. Although, the agreements were still in effect in 2011, there was **no evidence presented in this present case indicating any attempt by Respondent to enforce those agreements**. To the contrary, as shown, all of the employees were invited to apply, and a significant number were hired.

Respondent, in fact, attempted in the hearing to establish its accomplishment of the second affirmative remedy, on the cross-examination of Local 11's Austin Lynch. Your Honor, however, sustained an objection to this line of questioning:

> BY MR. TERRELL: Now, you testified on direct that you were not aware of any collective bargaining at the Hotel Bel-Air since the closing. Do you recall that testimony?
>
> Q I don't think that's what I said.
>
> A . . . tell me what you did say if I got that wrong.
>
> A I think what I said was that the hotel hasn't bargained changes since they reopened. There was definitely bargaining.
>
> Q *It was bargaining over the effects, correct? Since the closing in 2009*?
>
> A *That sounds right*.
>
> Q Okay. And there have been *recent attempts to resume those negotiations*?
>
> MR. PENTESHIN: *Objection*. Relevance.
>
> JUDGE THOMPSON: Resume – I'm sorry, counsel, I *need clarification* on your question. *Resume negotiations on the effects bargaining* or resume *negotiations on bargaining*?
>
> MR. TERRELL: *On the effects bargaining*.
>
> JUDGE THOMPSON: Okay. *Sustained*. We're talking about this case, not the previous case.

Tr. 632-33 (emphasis added).

Because Respondent was not allowed to prove that the parties in fact pursued the effects bargaining ordered by the Board in the first Hotel Bel-Air case, and further that Respondent's remedial obligation to do so was met to the satisfaction of the Regional office – as confirmed by the attached compliance closure letter, as to which, again, administrative notice *must* be taken (see footnote 13) – the General Counsel and the charging party cannot now be heard to

argue that the former employees had any right of recall (even though their argument is premised actually on much less; it is premised on merely a speculative and subjective *expectation* of recall). Opposing counsel, in short, cannot be heard to argue, based on the premise of the comment concerning a supposed expectation of recall, that the employees were somehow entitled to recall, or that Respondent had an obligation to recall

The Board, quite simply, did not impose such an order in the first Hotel Bel-Air case. It imposed only an obligation to resume the effects bargaining, and this remedy has been met. To the extent this fact does not appear directly in the record, it is only because this tribunal sustained the charging party's objection to keep it out. Opposing counsel, therefore, may not be permitted to argue that a right of recall existed, when in fact the expired CBA granted only a nine-month right of recall.

Had Respondent been allowed to present the whole set of facts, it would have been established in this case that (a) Respondent made numerous attempts to request meetings for the resumption of the effects bargaining; (b) the union rebuffed those efforts (after first requesting the bargaining), and that, therefore, no actual changes to any of the effects were agreed upon, including no change to the nine-month cut-off of recall rights; and (c) the Region was satisfied that Hotel Bel-Air met its obligation in attempting to resume the bargaining over the effects.

ARGUMENT AND CITATIONS OF AUTHORITY

A. The General Counsel's Theory of the Case, of Seeking to Prove Only So-Called "Generalized Animus."

It was made clear at several points during the trial that General Counsel's theory is to prove only "generalized animus," as opposed to "particularized animus." This is not terribly surprising, given the rank absence in the record of not only animus aimed at particular

applicants, but an absence of animus attributable to particular members of management – or to the hiring process itself as planned and executed.

As an example of the articulation of the General Counsel's so-called generalized animus theory (supported by the charging party), attention is directed to the testimony of former employee Amanda Escobar (described in greater detail, page 46, above). Respondent sought to elicit her knowledge of former employees who had been hired, notwithstanding their participation in the widespread picketing of the Hotel, to which the charging-party's counsel objected on two separate grounds – relevance, and also privilege under *Berbiglia*. Mr. Penteshin argued the privilege should hold, because the "General Counsel's theory of the case . . . is one of generalized animus toward former employees who reapplied." Tr. 1652-53. [15]

Another, more completely stated example: In the testimony of a former-employee presented during the General Counsel's case in chief – Pablo Del Real, who was not hired by the Hotel – the witness was asked by Respondent's counsel on cross-examination if he had "ever let any manager at the Hotel Bel-Air know that [he] supported the union," and was asked also if he had ever been a "shop steward" in the old Hotel. Counsel for the General Counsel (CGC) objected on the grounds, as in the first example, of relevance and privilege under *Berbiglia*. Tr. 1188-89. Ms. Dowell for Respondent, in response to this objection, argued: "[W]hether or not he was openly participating is definitely relevant to whether or not any of that knowledge was relied upon [by Respondent, when hiring] in 2011." Id. The objection was correctly overruled, and Mr. Del Real replied "No," that he had never "communicate[d] to a manager of the Hotel that [he] was a supporter of the union. Tr. 1189-90.

[15] Your Honor correctly overruled the relevance objection, but in Respondent's opinion incorrectly sustained the privilege objection.

However, in pressing her objection to the question posed to Mr. Del Real, Ms. Palencia for General Counsel asserted: "[T]he theory of the [General Counsel's] case is that respondent here discriminated against these individuals because they were represented and part of the union and [in a] collective bargaining unit that is represented by a union." Id. Ms. Palencia then described the General Counsel's case as one in pursuit of a "generalized theory, not a particularized theory," and that General Counsel was not seeking to establish "that every [alleged discriminatee] individual had to be participating in union activity" in order to prove this "generalized" theory." Id. She asserted that the following is by itself sufficient: "It is by their very nature of being in a unit that is represented by the union." Id.

The CGC offered a more complete statement of this so-called "generalized" theory in their brief dated March 16, 2017, served in response to Respondent's 13th and 14th affirmative defenses in its amended answer. (Respondent could not locate a copy of this brief among the exhibits; however, the amended answer is in the record as **Exhibit ALJ-1.**) Respondent, by these affirmative defenses, asserted that CGC should be required to prove its case by presenting more than simply a handful of witnesses, inasmuch – among other reasons – critical elements of the proof of liability would be improperly deferred to the compliance stage, citing *inter alia*, to *NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953 (6th Cir. 1998). In defending their position that General Counsel is permitted to proceed in this manner, the CGC stated their "theory of violation is not that there was some particularized animus against each of the alleged discriminatees as individuals." Instead, the CGC sets forth what is, effectively, a three-part theory of establishing the 8(a)(3) violation they seek. Quoting again from their March 2017 brief, the CGC stated their aim was to (1) prove only "generalized animus against the Union," and then show (2) that the old-Hotel employees "were not recalled, considered for rehire, or

rehired," in order to (3) accomplish the Hotel's alleged goal of "avoid[ing] recognition of the Union upon reopening."

Respondent notes, first – with respect to the second part of this theory – that it is abundantly clear in this record that the former employees were indeed "*considered for rehire*," and that, additionally, a significant number were in fact hired. Respondent notes, also, as shown in section G, immediately above, that Respondent was under no contractual duty with Local 11 "to recall" the former employees – given the recall rights Local 11 freely bargained for in 2006 – and further, that there is nothing in the holding or in the order by the Board from the first Hotel Bel-Air case which compelled the Respondent to recall those employees. The sole relevant remedy imposed by the Board was to resume the effects bargaining. [16] That remedy has been met.

* * * * *

More broadly, generalized animus cannot be applied, the Board has held, due simply to an unfair labor practice having been established against a party in an earlier case. As explained in *Mt. Clemens General Hospital*, 344 NLRB 450, 455 (2005):

> Where a prior unfair labor practice violation has been used to establish animus in a pending case, the events in the prior case typically have occurred *close in time* and were often *connected to the events* underlying the alleged violation *in the pending case*. In addition, the prior case animus was *typically accompanied* by independent evidence of *animus in the pending case*.

As discussed in section G, above (The Relevant Facts of the First Hotel Bel-Air Case), there is no 'connection' between the events in the first case and this present case – the persons

[16] The Board also directed a rescission of the waiver and release agreement, which is immaterial as shown in footnote 14, above (no evidence presented in this present case indicating any attempt by Respondent to enforce those agreements).

involved were different, and the nature of the alleged ULPs are different – and the start of the two events were two years apart. Moreover, the found ULP in the first Hotel Bel-Air case, involving a technical failure on Respondent's part of declaring and acting upon an impasse prematurely (after lengthy prior bargaining), is not of the same category or severity of animus alleged in this case, not to mention – as shown throughout this brief – the rank absence of *any* animus in this present case. And thus, the 'accompanying animus' in a subsequent case, which the Board noted in *Mt Clemens* is "typically" found, is not found here. The following survey of cases from the *Mt Clemens* decision fleshes out these points, and illustrates the non-applicability of this theory here:

> For example, in *Stark Electric, Inc. (Stark II),* 327 NLRB 518 (1999), the Board affirmed the administrative law judge's findings and conclusions that in *March 1996* the Respondent failed and *refused to hire five union electricians*. In addition to independent evidence of animus toward the five *Stark II* discriminatees, the Board found animus based on an *unlawful derogatory statement* made by the employer in May *1996* to a job applicant *about* the five Stark II discriminatees in the prior case *of Stark Electric, Inc., (Stark I),* 324 NLRB 1207 (1997) . . . See also, *Tama Meat Packing Corp. v. NLRB,* 575 F.2d 661, 662-663 (8th Cir. 1978) (evidence adduced in *1975* unfair labor proceedings to establish animus in *1976* discharge proceeding was proper because of close proximity in time and because the animus in the prior adjudication was *supported by other evidence of animus in the case pending*); *NLRB v. Clinion Packing Co.,* 468 F.2d 953, 954 (8th Cir. 1972) (evidence of employer's prior unfair labor practice could be used to demonstrate animus in pending case because all the activities complained of in the prior and pending case occurred within approximately a *1-year period* and there was other evidence of *animus in the case pending*).

344 NLRB at 455-56 (emphasis added). In the *Mt. Clemens* holding itself, involving allegations under 8(a)(3) (alleged unlawful refusal to hire) and 8(a)(5) (refusal of an information request), an earlier finding of an "unlawful prohibition against wearing . . . union protest buttons" was four years old, and the Board held further that "there is no factual connection" between the ULP allegations.

See also, dissent by Member Miscamarra in *Auto Nation,* 360 NLRB 1298, 1309, n.5 (2014), critical in that case of the 2014's Board over-reliance on general animus:

> The General Counsel *is* required, as part of his initial burden, to prove the existence of a nexus between protected activity and the particular decision alleged to be unlawful. In *Wright Line*, the Board explicitly characterized the General Counsel's initial burden as requiring proof that the challenged adverse action was motivated by antiunion animus.
>
> ***
>
> Contrary to the formulation set forth in the majority opinion, *generalized antiunion animus does not satisfy the initial Wright Line burden absent evidence that the challenged adverse action was motivated by antiunion animus*. See, e.g., *Roadway Express*, 347 NLRB 1419, 1419 fn. 2, 1422-1424 (2006) (evidence of union's generalized animus towards financial core payers insufficient under the circumstances to sustain General Counsel's burden of proof); *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 418-419 (2004) (finding that employer harbored animus against union activity, but that there was insufficient evidence to establish that animus against employee Rosario's union activity was a motivating factor in the decision not to recall him), enfd. 156 Fed. Appx. 330 (D.C. Cir. 2005).
>
> ***
>
> More generally, the Board's task in all cases that turn on motivation "is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of the employer which detrimentally affect" their employment. *Wright Line,* above, 251 NLRB at 1089.
>
> ***
>
> *Wright Line* itself explicitly states the General Counsel's initial burden as to make a prima facie showing that protected activity was a "motivating factor" in the particular "decision" alleged to be unlawful. *Wright Line,* 251 NLRB at 1089.

Respondent will now address the case law relied upon by the General Counsel in seeking to advance this so-called theory of generalized animus. Given the central importance of proving motivation and intent as the causative factor that results in an alleged unlawful action at issue, in order to establish an 8(a)(3) violation, a healthy skepticism of this notion of "generalized" animus is warranted.

B. The Cases Relied Upon by General Counsel are Plainly Distinguishable, and Do Not Support Application of So-Called Generalized Animus to this Case.

The primary case relied on by CGC, cited in their March 2017 brief, is *Glenn's Trucking,* 332 NLRB 880 (2000). This case is readily distinguishable by its facts. The Board stated:

> As set forth in detail in the judge's decision, the Union presented the Respondent with a copy of its "Preferential Hiring List" (list) containing the names of 25 employees *identified to the Respondent as sympathetic to the Union*. All 25 individuals named on the list applied to the Respondent for jobs at the Starfire Mine.

332 NLRB at 881 (emphasis added).

The record showed that this respondent then "hired 141 drivers" over a ten-month period, "only 7 of whom were on the [union's] list." Id. One of these seven was hired prior to the company's receipt of the list. Thereafter, the company only "belatedly hired [the] six additional list employees." Thus, "there remained 116 job vacancies that could have been filled by the discriminatees." Id. On this evidence, the Board held:

> We agree with the judge that "[t]he possibilities of the Respondent's lawfully filling [the remaining] vacancies *without hiring one employee* on the Union's *'Preferential Hiring List*' are, *at minimum*, *statistically remote*," and his further finding that "[t]he *extreme* [Union versus nonunion hiring] *ratios* clearly *demonstrate animus* against the employees whose names had appeared on the Union's 'Preferential Hiring List.'" The judge implicitly found a "*blatant disparity*" in the Respondent's treatment of applicants. In these circumstances, the statistical evidence can be used as an element of animus.

Id. (emphasis added).

However, the afore-stated was *not* the only evidence in the case supporting a finding of animus. "In addition, we are satisfied," the Board stated, "that the General Counsel has established the falsity of the Respondent's contention that the discriminatees were unqualified

or less qualified than the employees the Respondent hired and that they had been passed over during an 'honest random selection process' [explained below]." Id.

The evidence of pretext, as set forth in the judge's decision, was exceptionally clear. All three of the respondent's defenses were shown to be false and were stricken. First, the judge credited witnesses who testified that the employees on the union's list were told that the "only condition" to being hired was the obtaining of a class-A license. With only a handful of exceptions, all of the discriminatees on the list either already held that license, or immediately thereafter obtained the license. But still, they weren't hired. 332 NLRB at 895-96. Second, the company then effectively changed the rules of the game, by taking the position that, despite the Class-A license, the applicants "were not experienced in driving tractor-trailers." 332 NLRB at 896. As laid out by the judge in his decision, this simply was not the case, as many of those who were in fact hired did *not* have such experience, and that the requirement for the tractor-trailer experience had been raised as only an "obvious afterthought." 332 NLRB at 896-97. Third, and quite stunningly, "not 1 of the employees named on the Union's 'Preferential Hiring List' was called for an interview." 332 NLRB at 897. Making this fact even worse, the company clumsily failed in its attempt to explain this away, by asserting (as referenced in the Board's decision, quoted above), that this occurred due only to a "honest random selection process." Explaining this further, the judge wrote:

> . . . although all of the alleged discriminatees had submitted an application by July 14, on every subsequent review of the stack of applications (however they were arranged), *not one of them was selected to be called in for an interview*. The Respondent proved that it rejected about 100 other applications, but it did not have 100 other applications before the alleged discriminatees applied. Of course, as time went by and more applications were received, the mathematical chances of any one applicant's being called diminished, but it is *too much to believe* that the *applications of all 23* of the alleged discriminatees were subsequently *passed over by simple chance*, and I do not believe it.

> *Gilliam* testified that he would *review just a few applications* before he would call any applicants to come in for interviews. *This testimony made no sense*, and it was incredible, because such an approach would not have permitted the finding of the best applicants available at any given time. *Hoskins at first testified* that he *examined all applications*, "from front to back and got the most qualified driver." *When* he was *shown* the *applications of obviously qualified alleged discriminatees* whom he personally knew, however, *Hoskins retreated to Gilliam's approach* and *stated* that he *actually looked only at a few* applications before he called applicants to come for an interview. Hoskins *could not explain his inconsistency*, but I can. Hoskins, like Gilliam, was not testifying truthfully.
>
> I firmly believe that there was no randomness to the Respondent's selections after August 1, at least as far as the alleged discriminatees were concerned. *Hoskins testified* that from his *prior working experience* at Leslie Haulers, and elsewhere, he personally knew alleged discriminatees Hayes, Brewer, Strong, Lovins, Cockrell, Ray Napier, Grover Napier, Ronk, Stacy, Bush, Godsey, Fugate, Combs, and Caudill. Hoskins *agreed that all of those men were good drivers*, and Hoskins further agreed with the blanket proposition that he "*would have hired any of them*." It is too much to believe, and *I do not believe*, that *only random chance prevented Hoskins from calling any of these drivers* whom he knew and would have hired.
>
> That is, I do not believe the testimony of Gilliam and Hoskins that the applications of the alleged discriminatees were blindly placed with all other applications. It is *quite apparent*, and I find, that the *applications of the alleged discriminatees were somehow isolated* from those of other applicants, and the alleged discriminatees had *no chance of being called in for an interview* when the Respondent needed a truckdriver . . . Therefore, *I reject* the Respondent's defense that the alleged discriminatees were passed over by an *honest selection process*.

332 NLRB at 897-98 (emphasis added).

Accordingly, and only on the totality of all this terrible evidence for the employer, did the Board conclude that, "the circumstances warrant the inference that Respondent's true motive is an unlawful one," citing to *Wright Line*. The Board specifically noted in its next sentence that "Respondent's asserted business reasons were pretextual," and then explicitly rejected the defense that Respondent "would not have hired the discriminatees or delayed in hiring them or offering them jobs, even in the absence of their union sympathy." 332 NLRB at 880.

The facts in the present case are, of course, very different. Taking the last point first – the Board's rejection of the defense that it would not have hired the pro-union employees on

the list, "even in the absence of their union sympathy" – the facts in this present case establish that *over 100 employees* of the Bel-Air, as of the time the Hotel closed in September of 2009, were far from 'sympathetic' to the union, as these 100-plus employees had in fact signed a decertification petition to kick the union out. See, the admission in the testimony of Lynch, described in section F, above, and see the redacted copy of the petition, at **Exhibit R-75**.

Should one assume that those who did *not* sign the decertification petition *were* sympathetic, one would then expect – in a case that actually proves unlawful animus – to see evidence of some effort by the employer to 'weed out' those falling into this latter category. There is not, however, even a whiff of such 'weeding-out' evidence anywhere in the record. Indeed, given the neutrally designed selection process – with interviewers who had no prior Bel-Air experience, and who did not, therefore, personally know the former-employee applicants, and given the absence of access to old personnel files – there is simply no basis for concluding that any such 'weeding-out' effort was ever afoot. In addition, as shown above, each interviewer had sole discretion in deciding who to reject or accept, and all of them testified that there were no incidents of being told – by someone who might know an applicant – to not hire a particular individual (for "union" reasons, or for any other reason).

Moreover, there is no evidence in this case from which any finding of pretext can be based. As shown above in detail, the witnesses who managed the hiring process (Lukey and Arbizu), and all of the other witnesses who participated in this process, testified consistently to a clearly formed and applied hiring process, aimed only at the business-judgment goal of hiring the type of "exceptional talent" that these witnesses testified to, again, with consistency.

The other case relied on by CGC in its March 2017 brief is *Fluor Daniel, Inc. & Int'l Bhd. of Boilermakers*, 304 NLRB 970 (1991). This case is also notably distinguishable, given

the "blatant disparity," 304 NLRB at 971, found in the hiring of non-union candidates versus the non-hiring of a group of 48 candidates who plainly identified to the employer as union affiliated. Concerning these 48 employees – the case involved a construction project – the Board summarized the judge's findings as follows:

> In early 1988, the Savannah Building Trades attempted unsuccessfully to persuade the Respondent to sign a prehire agreement at one of its construction projects . . . On December 20, 1988, between 100 and 150 members of various building trades appeared at a temporary employment office to apply for jobs at Union Camp. *Of the 48 alleged discriminatees* who were members of the Electrical Workers, Ironworkers, and Operating Engineers, *none was hired* to fill *any of the 13 positions* that were *available* to applicants *without prior Fluor Daniel experience*.
>
> *******
>
> . . . the Respondent clearly had knowledge that *all 48* alleged discriminatees *were union affiliated*. As found by the judge, every one of the applications revealed some indicia of union membership, and *all but two of the applications* were *filed* on the morning of December 20, 1988, *en masse*, at the Respondent's employment office. *None* of the discriminatees *was* offered a position with the Respondent, *called in for an interview*, or *even contacted* by the Respondent after submitting an application. This occurred *even though*, as the judge found, *each* had at least *a few years of experience* and many listed *credentials* which should have *at least warranted some type of inquiry* by the Respondent.
>
> The *applicants* who *were offered employment*, on the other hand, *uniformly displayed* either *weak or nonexistent union ties*. In fact, *many* had *work histories with well-known nonunion employers*. We find it reasonable to infer that it was not just coincidental that all those applicants who displayed union affiliation were refused employment while those who were hired did not display union affiliation. We *conclude* that such a *blatant disparity* is sufficient *to support a prima facie* case of discrimination.

304 NLRB at 970-71 (emphasis added).

Similar to the *Glenn's Trucking* case discussed above, the 8(a)(3) violations were only found after determining false pretext in the employer's defense:

> We further agree with the judge's conclusion that the applicants were bona fide. We find *no evidence* even *remotely suggesting* that the *applicants in question were doing anything other than legitimately seeking work* with the Respondent. In fact, the judge found, and we agree, that the discriminatees would have gone for interviews and very likely would have accepted employment with the Respondent, if such an offer had been made.

Id.

Moreover, the Board seemed to reach a rather common-sense conclusion in rejecting what "Respondent seems to contend" – *i.e.*, that "its refusal to consider *any* of the 48 applicants" was "justified," on the contended basis that "the applicants were not bona fide." Id. Given, that is, the clear indications that these applicants were affiliated with the union – and who applied, as they did, en masse on a single day – the Board found it simply improbable that the employer's action (in failing to *even consider* any of the 48) was "*not* motivated by antiunion animus." Id. (emphasis added). The Board reasoned: "Surely, the applicants' union affiliation must have played some role in the Respondent's determination that the applicants were not bona fide and its subsequent refusal to interview or hire any of the 48 discriminatees." Id.

On the basis of *all* these facts, the Board concluded, "the evidence as a whole supports an inference that the Respondent discriminatorily and purposely failed either to consider the applications of, or offer employment to, any of the 48 discriminatees," and stated also:

> The Respondent offered *no credible reasons* to explain *why none* of the 48 *was considered* in the *same manner* for employment *as the other applicants*. We find persuasive the judge's comparisons and analysis of the resumes and credentials between applicants who were hired by the Respondent and those who were not, and her finding that factors other than merit caused the Respondent to discount the union applicants.

Id. (emphasis added).

Once again, this case is readily distinguishable. The present case is not one where ***all*** of the candidates at issue – *i.e.*, here, the former Bel-Air employees – were not hired, or were not "called in for an interview, or even contacted." Here, by contrast, ***all*** former Bel-Air employees were expressly invited to apply, ***all*** were interviewed, and 29 were in fact hired (or, 16.9%).

And thus, this present case is far more comparable to a case which, despite similar facts to *Fluor Daniel*, reached a very different result – *Micrometl Corporation*, 333 NLRB 1133 (2001). This case involved "42 overt 'salts'," none of whom were hired. No 8(a)(3) violations were found and the complaint was dismissed in full, because – like the present case – there was no evidence of animus, and no false explanation was given by the employer for its decision not to hire the 42 salts. The essential facts to understand in the reaching of this result were set forth in the judge's decision, adopted in full by the Board:

> In this particular case 42 overt "salts" applied for work with Respondent over a 1-year period. When applying for work ***these overt "salts" identified themselves*** on their job applications ***as union organizers***. They were ***not hired***. The General Counsel maintains that they were not hired because of their union affiliation and the refusal to hire or even consider them for hire was a violation of Section 8(a)(1) and (3) of the Act.
>
> Respondent maintains, on the other hand, that it did not violate the Act in any way. Rather, because of high turnover, namely, 8 out of 10 employees not staying past their 90-day probationary period, ***Respondent decided in late 1995*** to ***hire no one who made more than $10 per hour on their last job***. According to Lisa Tornes, Respondent's human resources manager, her study of the high turnover at Respondent's facility led her to recommend to higher management who adopted her recommendation that Respondent hire no one who made more than $10 per hour at their last job. According to Lisa Tornes, implementation of this policy for the 2 years it has been in effect resulted in reducing Respondent's turnover rate from 8 out of 10 not staying past 90 days to 6 out of 10 not staying. …
>
> Tornes also testified that the only requirement to work for Respondent was that the applicant be 18 years of age or older. The nature of the work, classified as general laborer required no particular skills and paid $7 per hour to start.

> It is stipulated by the parties to this litigation that all the union applicants were 18 years of age or older when they applied and would have taken a job with Respondent if offered one. In addition, it is clear and no one disputes the fact that the overt salts were amply qualified to work for Respondent, a sheet metal fabricator in the heating and air conditioning industry, and Respondent was hiring when they applied.

333 NLRB at 1134 (emphasis added).

Unsurprisingly, the judge initially observed: "Needless to say this rationale for not hiring the union applicants is suspect on its face because as all parties to these proceedings acknowledge applicants for employment who are union members will almost invariably have more than $10 an hour in their last employment." Id. He determined, nonetheless, that "Respondent's rationale" would "pass muster if in fact it was uniformly applied." Id.

The judge then examined the evidence carefully, including "copies of the applications [of] all but eight of the above applicants," as well as hear testimony from those eight applicants, and also testimony from "a number of other applicants." Id. The judge found that "all 42 overt salts did apply for work with Respondent." Id. He examined, further, the validity of the employer's claim that it, in fact, maintained and followed a strict criterion of not hiring any applicant "who made more than $10 per hour at their last job." Based on the evidence outlined in the decision, the judge found the "evidence demonstrates that [this criterion] *was* uniformly applied," with both the overt salts and the other applicants. Id. (emphasis added). His decision was supported further by the fact that there was "no evidence of union animus," including no "'smoking gun' memo" supporting the notion that "implementation of the $10 rule . . . would enable Respondent to remain union free." 333 NLRB at 1135.

On this basis, the General Counsel's complaint was dismissed in its entirety. The facts in the present case are materially similar. Like the employer in *Micrometl*, Hotel Bel-Air received

applications from union-affiliated candidates. Also like the employer in *Micrometl*, Hotel Bel-Air established a fixed and faithfully executed set of criteria for who it would hire and not hire, and these criteria were "uniformly applied."

The last case cited by CGC in its March 2017 brief is *Pressroom Cleaners*, 361 NLRB 643 (2014). This case involved a janitorial company, Pressroom Cleaners, which acquired a contract through a bidding process to handle the janitorial services of a newspaper company. These services had previously been performed by another company, called Capitol Cleaning, which had eight (8) employees represented by a union.

The facts in the record established plainly that Pressroom Cleaners was properly regarded as a successor employer (the same services; the same location). Correspondence and other communications between Pressroom and the union made it clear to Pressroom that the eight employees were represented by the union. Pressroom, initially, appeared to consider hiring six of the eight employees. However, in a key meeting prior to execution of any decisions made by the company, held between five of the six employees and Pressroom's decision-makers, the employees were told that Pressroom "does not work with unions, does not deal with unions and does not want a union at all." 361 NLRB at 659. Subsequently, a union representative spoke with one of the decision-makers, who told the union the company "was still looking into its options." Id.

Ultimately, "Respondent never let the employees know about its decision on whether to hire them. Rather . . . it did not hire any of them and filled its staff with all new employees." Id. The union then began an organizational campaign for the new employees. A company manager, observing this, threatened two of the new employees, directing them not to talk to the organizer

and stating that "the crew that used to work here had the union and that is why they weren't working at the [newspaper]." Id.

Based on these obvious indicators of union animus, as well as numerous others set forth in the lengthy decision, the Board found that Pressroom violated section 8(a)(3) by "discriminatorily refusing to hire [these] six Capitol Cleaning employees because of their union affiliation." 361 NLRB at 643. The Board found also that the defenses provided for the hiring decision were pretextual. 361 NLRB at 659.

It goes almost without saying, given the abundantly obvious evidence of animus in *Pressroom Cleaners*, that the present case is imminently distinguishable. *Pressroom Cleaners* certainly does not support the notion, nor do any of the cases discussed above, for application of a so-called generalized animus theory to the present case.

C. Cases in Addition to *Micrometl*, Discussed Above, Establish the 8(a)(3) Complaint Must Be Dismissed.

Shoreline South Intermediate Care, Inc.; Inland Pacific, Inc., 276 NLRB 913 (1985) involved facts and issues materially similar to the present case. The Board held the employer in that case, a successor to a unionized care facility, did not violate section 8(a)(3) in its hiring decisions related to the acquisition. The two named Respondents which acquired the facility were found to be joint employers. Shoreline South owned the facility; Respondent Inland Pacific was the management company.

An Inland Pacific executive by the name of Kenneth Thompson was closely involved in the transition and hiring related to Shoreline's acquisition. Thompson held several significant

discussions with supervisors in the facility prior to the acquisition. Other Inland personnel reviewed the employee files and held additional discussions with the pre-acquisition operator.

At the time of the acquisition, Inland Pacific (owned by an individual named Easterday) had management agreements at "16 or 18" other care facilities. A feature of the care facility industry is the high cost of labor. The Board noted: "Personnel problems are common, since approximately 60 percent of care facility expenses are consumed by employee payrolls." 276 NLRB at 914. The Board found the following, concerning Inland's management practices, related to previous acquisitions:

> When management of facilities is undertaken by Easterday, he *often makes major changes in personnel* in order to *increase efficiency* and to *bring expenses into line* with figures he has established as being proper for accounting purposes. Often he transfers employees to newly organized facilities, from other facilities he manages. *Prior to taking over a facility*, Easterday's firm (Inland Pacific) *ordinarily interviews existing employees* and checks references in order to determine those who will be retained.

Id. (emphasis added). "In some instances," the Board found, "a majority of existing employees are discharged, but in other instances most are retained." Id.

The pre-acquisition discussions between Thompson and the supervisors employed by the then-operator were at time acrimonious, and several of these supervisors later testified to comments by Thompson that were argued as demonstrating union animus on Thompson's part. And indeed, as shown below, animus on Thompson's part was found.

Nonetheless, the hiring interviews were carried out by three Inland Pacific employees delegated by Thompson – Ocie Davis interviewed nursing personnel, Greg Mattern interviewed maintenance workers, and Lydia Eppie interviewed food workers. True to Inland Pacific's operating practices, noted above – and described elsewhere as "aggressive [and] profit-

oriented," Tr. 276 NLRB at 918 – the hiring decisions by these three resulted in a significant reduction of the number of former employees hired.

At some point shortly before the acquisition, though the exact date is not clear from the decision, the employees of the then-operator, Hillhaven, were given the following notice:

> As you are all by now aware, SHORELINE SOUTH INTERMEDIATE CARE, INC. will commence operations at these premises beginning November 1, 1984.
>
> SHORELINE SOUTH INTERMEDIATE CARE, INC. *establishes its own terms and conditions of employment* and *hires* in *accordance with* its *own standards*, designed to assure excellence in patient care.
>
> SHORELINE SOUTH INTERMEDIATE CARE anticipates it may have some openings for positions at these premises. *We welcome you to apply* for any openings that we may have available. *Such openings are*, of course, *upon* SHORELINE SOUTH INTERMEDIATE CARE'S *terms and conditions* and according to its *hiring standards*.

276 NLRB at 919 (emphasis added).

Meanwhile, discussions were ongoing between Inland Pacific and representatives with the union. Nonetheless, as noted above, a substantial number – less than a majority – of the former union-represented employees were not hired. The primary issue presented to the Board was: "[W]hether or not Respondent failed or refused to hire employees previously working at the facility managed by Hillhaven because they were union members or supporters, in order to avoid entering into a collective-bargaining agreement with the Union in violation of Section 8(a)(1) and (3) of the Act." 276 NLRB at 915.

The secondary issue was whether Shoreline was a successor to the previous operator (Hillhaven), which the Board readily found to be the case. Id.

Following the decision's lengthy exploration of the discussions held between Inland Pacific (primarily Thompson) and Hillhaven's supervisors, as well as the results of the hiring

decisions (both union and non-union employees fell into both categories of hired and not hired), and an exploration also of the discussions and exchanges between Inland Pacific and representatives of the union, the Board-affirmed decision by the judge determined that the hiring decisions were not motivated by union animus. "The General Counsel argues that Respondent intended from the outset to get rid of the union employees, but that argument is not supported by the record." 276 NLRB at 922. Interestingly, and very similar to the present case: "Most of the alleged 8(a)(3)s did not testify, and there is no evidence of the interviews, other than the credible testimony of Davis, Mattern and Eppie [Inland Pacific's three interviewers delegated by Thompson]." Id.

Similar also to the present case, "testimony was directed to the length of time that many of the discharged employees had been working for Hillhaven [the predecessor, unionized operator]." The judge, however, gave correct weight to Inland Pacific's hiring criteria (noted above, emphasizing efficiencies and cost reductions), and stated that 'longevity' was "not proof of *acceptability* of those employees *so far as Respondent was concerned*." Id. (emphasis added).

"It probably is true," the judge wrote, "that *Thompson did not like the Union*, and did not want Respondent to be unionized. However, *that fact alone is not controlling* . . . the leap between Thompson's union animus and discharge of the employees is too great for accomplishment solely by inference. Such an inference is all that is presented." Id. (emphasis added). The judge's finding in this regard was based on the credible testimony of the three interviewers, Davis, Mattern and Eppie:

> These . . . three did the hiring and initial work scheduling of unit employees, and all of them testified that, in so doing, they *acted solely pursuant to their own judgment*. All of them testified that *no one told them not to hire old employees*, *or* to hire in order to undercut the Union.

Id. (emphasis added). The parallel to the present case is obvious, as has been shown above, establishing that the Bel-Air interviewers were given sole discretion to make the decisions on whether to pass candidates on to the next level, and none were told not to hire or to control the number of former Bel-Air employees.

As noted above, the Board readily found that Inland Pacific and Shoreline South, as a joint employer, was a successor to Hillhaven. 276 NLRB at 924 ("same facility in the same location with the same equipment and employee classifications"). "Had a majority of the same employees been retained," the Board-affirmed judge correctly wrote, "all legal implications flowing from successorship would have applied." Id.

> However, a *successor employer is not obligated to hire any of its predecessor's employees*. Thus, Respondent was free to hire an entirely new work force if it so desired, in which case the obligations of successorship would not apply.
>
> However, the right to hire new employees does not prevail if former employees are rejected solely because of their union affiliation. The *General Counsel argues* that "*Given Respondent's practice of only operating nonunion facilities*, this circumstance *alone supports a finding* that Respondent purposely did not retain employees because of their union affiliation." That conclusion is *not warranted*. There is *no such per se rule of law*, and the facts of this case do not support that conclusion. the General Counsel adds to that argument the conclusion that Respondent's union animus supports a finding that former employees were rejected for union reasons. That conclusion *equally is unwarranted*, as discussed supra. As earlier noted, *union animus does not, per se, create a violation of the Act*.

Id. (emphasis added).

The Board-affirmed judge noted also in a footnote, as to facts similar to the present case: "Counsel for Respondent argues that this *right to hire a new employee complement* and the *fact* that *16 former employees were hired* militate against a conclusion that Respondent hired new employees *in order to eliminate the Union*, rather than for *legitimate business purposes*. That argument is *not without merit*." 276 NLRB at n. 36 (emphasis added).

While Hotel Bel-Air was operated by Dorchester both before and after the two-year shutdown for renovation, the same principles apply. Dorchester was "free to hire an entirely new work force if it so desired," subject only to the proscription of section 8(a)(3) that employees may not be "rejected solely because of their union affiliation." (quoting, 276 NLRB at 924, above). As also shown above, Dorchester was under no contractual obligation with Local 11 to recall the former employees, given the nine-month recall cut-off to which local 11 had agreed – fairly and freely – in the CBA that was in force at the time of the Hotel's closing, and there was nothing in the decision from the Board's first Hotel Bel-Air case which compels any different conclusion, especially as the Hotel has fulfilled its compliance obligations, as shown.

It is fundamental to Board law applying section 8(a)(3), that "the Act require[s] only that [an employer] not discriminate against [employees] in its hiring practices" relating to union membership. *Industrial Catering Co.*, 224 NLRB 972, 978 (1976) (dismissing in its entirety an 8(a)(3) based case), citing to *Phelps Dodge v. NLRB,* 313 U.S. 177, 197-98 (1941). Similarly, as stated by the Board in the immediately following sentence in this case: "[The Act] did not require that the [employer] alter its personnel practices to favor the hiring of those [with union affiliation]." Id. Thus, in the present case, pursuant to basic section 8(a)(3) jurisprudence, the Hotel was under no obligation to create a preference, or what would amount effectively to an affirmative-action hiring plan favoring the former employees, if shown that to impose such would be contrary to, or require alteration of, legitimate business objectives identified by the Hotel. As has been shown by this record, the Hotel established and followed a consistently articulated legitimate business plan concerning the type of employee it wished to hire for the new Hotel Bel-Air, and did so without regard to union membership.

See also, Big E's Foodland, Inc., 242 NLRB 963 (1979) ("[A] purchaser of the assets of a business has no obligation to hire the seller's former employees, [unless] the refusal to hire is . . . motivated by antiunion considerations").

And see, finally, *Inland Container Corp.*, 267 NLRB 1187, 1190 (1983) ("The law is clear that a successor employer is under no obligation to hire all or any of the predecessor's employees, and that in order to establish a violation of the Act under such circumstances, discriminatory motivation for the failure to hire must be proved"). The respondent in this case took over a plant and made the conscious decision to hire an inexperienced work force, a method which had worked for it previously. The Board held the General Counsel failed to prove that the employer had intentionally refused to hire union employees. The judge, whose decision was affirmed in total, noted that union counsel "cites numerous cases in which the Board has found a successor's refusal to hire the predecessor's employees violative of Section 8(a)(3) of the Act. However," the judge went on to write:

> . . . in the cited cases it was found that there was either **[1]** substantial evidence of union animus, **[2]** lack of a convincing rationale for refusal to hire the predecessor's employees, **[3]** inconsistent hiring practices, or **[4]** overt acts or conduct evidencing as discriminatory motive. In the instant case such indicia of discriminatory intent, I find, has not been demonstrated.

267 NLRB at 1190 (numbering in brackets added).

The Hotel respectfully submits, as shown, that *none* of these four numbered circumstances identified by this Board-affirmed ALJ decision – that *would* warrant an 8(a)(3) violation – can be found in the record of this case.

It should be noted, as well, that reviewing courts – including the Ninth Circuit – have held that the "weaker a prima facie case against an employer under *Wright Line*, the easier [it is] for an employer to meet his burden" in proving the affirmative defense under *Wright Line*. *Doug*

Hartley, Inc. v. NLRB, 669 F.2d 579, 582 (9th Cir. 1982); accord, *GSX Corp. v. NLRB*, 918 F2d 1351, 1357-58 (8th Cir. 1990).

In the case now before Your Honor, consideration of the four circumstances identified by the Board in *Inland Container*, quoted above, yields the following: there is no "substantial evidence of union animus," there were no "inconsistent hiring practices," and no "overt acts or conduct evidencing as discriminatory motive," including the fact that no imputation of the acts in the first Bel-Air case can be used to prove an "discriminatory motive" in this present case. Finally, as to these four circumstances, the Hotel has provided a "convincing rationale for [its] refusal to hire" some – and only some – of the former employees of the Hotel.

CONCLUSION

For the reason shown above, and based upon the authority cited above, the Respondent Hotel respectfully submits that the complaint must be dismissed in its entirety.

Dated this 9th day of November, 2018.

/s/ Karl M. Terrell

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ATTACHMENT A

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NATIONAL LABOR RELATIONS BOARD

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June 29, 2016

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Re: Hotel Bel-Air
Case 31-CA-029841

Gentlemen:

The above-captioned case has been closed on compliance. Please note that the closing is conditioned upon continued observance of the Court Judgment.

Very truly yours,

BRIAN D. GEE
Acting Regional Director

cc: UNITE HERE - Local 11
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATION BOARD
Division of Administrative Law Judges
San Francisco, CA

KAVA HOLDINGS, LLC, a
Delaware Limited Company, f/k/a
KAVA HOLDINGS, INC., a
Delaware Corporation, d/b/a
HOTEL BEL AIR

and

Case 31-CA-074675

UNITE HERE - LOCAL 11

PROOF OF SERVICE

I am employed in the County of Fulton, State of Georgia. I am over the age of eighteen years and not a party to the within action; my business address is One Atlantic Center, Suite 2400, 1201 W. Peachtree Street, Atlanta, Georgia 30309.

On November 9, 2018 I caused the following document(s) to be served:

- **RESPONDENT'S POST HEARING BRIEF**

on the interested party below in this action by filing the enclosed:

☐ BY MAIL: I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Atlanta, Georgia, in the ordinary course of business pursuant to Code of Civil Procedure Section 1013(a). I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ BY FACSIMILE: I served said document(s) to be transmitted by facsimile pursuant to Board's Rules and Regulations, Series 8, as amended, Section 102.24. The telephone number of the sending facsimile machine was (404) 766-8823. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The sending facsimile machine issued a transmission report confirming that the transmission was complete and without error.

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☐ BY EXPRESS MAIL: I caused said document(s) to be deposited in a box or other facility regularly maintained by the express service carrier providing overnight delivery pursuant to Code of Civil Procedure Section 1013(c).

Executed on November 9, 2018, at Atlanta, Georgia.

I declare under penalty of perjury under the laws of the State of Georgia that the foregoing is true and correct.

/s/ Erin Whitlock

Erin Whitlock, Paralegal
STOKES WAGNER